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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1498

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

PETITIONERS,

v.

NORTHEAST AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

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v.

NORTHEAST AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A (infra, pp. 9-27) and is reported at — F 2nd —. The opinion of the District Court is set out in Appendix C (infra, pp. 29-42) and is reported at 337 F. Supp. 499.

Jurisdiction

The judgment of the Court of Appeals was entered on April 20, 1972 (see Appendix B, infra, p. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether section 2 First of the Railway Labor Act, 45 U.S.C. 152, imposes upon an air carrier a duty to bargain with a union representing its employees about (a) whether it will merge with another air carrier, and/or (b) the effects upon its employees of any such merger.

Statute Involved

The statutory provision principally involved is Section 2 First of the Railway Labor Act. Section 2 First, 45 U.S.C. 152 First, provides as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreement or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Statement

The International Association of Machinists and Aerospace Workers and its District 147 (hereinafter referred to as "union") and Northeast Airlines, Inc. (hereinafter

referred to as "company") have entered into two collective bargaining agreements. (A 13, 20)[1] The first covers employees in the mechanics crafts[2]; the second covers supervisory employees.[3]

The company is a Massachusetts corporation and an "air carrier" within the meaning of the Railway Labor Act. (A 2-3) On May 12, 1971 the company entered into a formal merger agreement with Delta Air Lines, Inc. (A 58) That agreement provides, *inter alia*, that the separate corporate existence of Northeast will cease upon consummation of the merger and that Delta Air Lines, Inc. will continue as the surviving corporation.[4] (A 58-59)

The company entered into its merger agreement with Delta Air Lines, Inc.[5] without any discussion or negotiation with the union. The merger agreement contains a short paragraph entitled "Labor Protective Conditions"[6] (A 59). That paragraph makes no definite provisions for the seniority and other rights of Northeast employees represented by the Petitioner.

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[1] "A" refers to the Joint Appendix before the Court of Appeals, a copy of which has been filed with the Clerk.

[2] This agreement is dated April 18, 1969; it expired on December 31, 1971 but its terms continue in effect under the provisions of Section 6 of the Railway Labor Act, 45 USC 156.

[3] This agreement is dated November 6, 1969 and remains in effect by its terms until at least June 1, 1972. Both of these agreements contain the following provision in their respective Articles 3(B):

> "(B) It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights." (A 13 & 20)

[4] The merger must be approved by the Civil Aeronautics Board before it can be consummated. A CAB Examiner has recommended approval but the Board has yet to act on his recommendation. Under the terms of the Merger Agreement, CAB approval must come no later than June 30, 1972. If it does not come by that date, the merger agreement expires by its own terms. (A 81)

[5] Hereinafter referred to as "Delta".

[6] Paragraph 5 of the Merger Agreement.

The union demanded that the company meet and negotiate about proper provisions for the protection of the seniority and other rights of its member-employees; the union wanted the agreement reached in any such negotiations to be incorporated into any merger agreement between the company and Delta. The company refused to negotiate about this matter (A 33-34).[7]

Because of the company's refusal to negotiate about proper provisions for the protection of the seniority and other rights of its IAM member employees, the union turned to the courts for relief. On January 24, 1972, the union brought an action in the United States District Court, District of Massachusetts, to compel the company to bargain in good faith about the proper provisions for seniority or other rights of IAM member employees. The union requested that the merger between the company and Delta be enjoined until such good faith bargaining took place. The case was heard on the union's motion for a preliminary injunction; the District Court denied the injunction on February 3, 1972.[8] The union immediately appealed from the denial of a preliminary injunction. The Court of Appeals affirmed the decision of the District Court[9] on April 20, 1972.

Reasons for Granting the Writ

The question of whether an air carrier is required by the Railway Labor Act[10] to negotiate with a union representing its employees about (a) whether it will merge with another

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[7] The first demand to negotiate about this matter was made on November 11, 1971, the first day of negotiations for a new agreement covering mechanics. A subsequent demand was made on November 22, 1971; it too was refused (A 34).

[8] See Appendix C, infra, pp. 29-42.

[9] See Appendix A, infra, pp. 9-27.

[10] Hereinafter referred to as "the Act".

air carrier and/or (b) the effects upon its employees of any such merger is an important one. The holding of the Court of Appeals that an air carrier need not negotiate about either of these matters seriously narrows the protections afforded by Section 2 First of the Act.

1. Section 2 First requires all carriers "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes."[11] This section of the Act is enforceable by the courts.[12] *Chicago & North Western Ry.* v. *United Transportation Union,* 402 U.S. 370, 77 LRRM 2337.

The Company has taken the position that Section 2 First of the Act imposes no duty upon it to bargain about whether it will merge and/or the effects upon its employees of any such merger. The District Court and the Court of Appeals have sustained that position; the union asks this Court to overrule it.

2. To be sure, the decision to merge is a managerial one. So is the decision to subcontract all or part of the work of a business. The latter decision (and not just its effects) was held to be a mandatory subject of collective bargaining by this Court in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). The National Labor Relations Board has held that certain managerial decisions (and not just the effects of those decisions) are mandatory subjects of collective bargaining, i.e. selling part of a business. *Star Baby Company,* 140 NLRB 678 (1963) enforced as modified sub nom. *NLRB* v. *Neiderman,* 334 F.2nd 601 (2 Cir. 1964); relocating a business, *R. C. Can Company,* 144 NLRB 210 (1963); transferring work from one plant to another, *Shell Oil Co.,* 149 NLRB No. 26, *Ozark Trailers, Inc.,* 161 NLRB 561 (1966).

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[11] 45 U.S.C. 152 First.

[12] The Court of Appeals so held in this case despite the company's argument to the contrary.

The Court of Appeals distinguished the decision to merge from these other managerial decisions by calling it "much nearer the core of entrepreneurial control."[13] What that Court failed to take into account was that the merger itself would profoundly affect the working conditions of the employees involved in this case; it would almost certainly affect the rates of pay and rules under which such employees would be working.[14]

It must be emphasized that all the union is asking in this case is that the company bargain in good faith; an employer's obligation to bargain does not include an obligation to agree to the union's demands.

Although the obligation to bargain in this situation might reduce an employer's flexibility, the statute mandates that such bargaining take place. "Rates of pay, rules and working conditions" are mandatory subjects of collective bargaining pursuant to Section 2 First of the Act. Since the merger has an inevitable effect on those subjects, it must be bargained about upon request of the union.

3. Assuming arguendo that the decision to merge is not a mandatory subject of bargaining under Section 2 First of the Act, surely the effect of that decision is a mandatory subject. Among the principal effects of that decision upon the employees will surely be changes in seniority, employment and other rights. Even the Court of Appeals agrees "that employment security falls within the ambit of 'pay, rules and working conditions'[15]." The Court of Appeals goes on to recognize "the employers have an obligation generally to bargain about seniority, severance pay and other matters relating to employment security."[16] Even where the basic decision to act is not a mandatory subject of collective

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[13] Court of Appeals decision, p. 12, Appendix A, p. 20.

[14] There are approximately 1,000 Northeast employees who are represented by the union. Delta has over 20,000 employees; only Delta's pilots are represented by a union.

[15] Court of Appeals decision, p. 13; see Appendix A, p. 21.

[16] Court of Appeals decision, p. 13; see Appendix A, p. 21.

bargaining, there is a long line of cases that hold that the *effects* of that decision are mandatory subjects of collective bargaining. See, for instance, *NLRB* v. *Transmarine Navigation Corp.*, 380 F. 2nd 933 (9 Cir. 1967), *NLRB* v. *Royal Plating and Polishing Company*, 350 F. 2nd 191 (3 Cir. 1965), *NLRB* v. *Drapery Manufacturing Company*, 425 F. 2nd 1026 (8 Cir. 1969), *Morrison Cafeterias Consol., Inc.* v. *NLRB*, 431 F. 2nd 254 (8 Cir. 1970). These National Labor Relations Act decisions apply by analogy to the Railway Labor Act.[17]

The Court of Appeals decision in this case conflicts with all the above-mentioned cases. It is in direct conflict with the principle that underlies all these decisions, namely, that the effects of economically motivated managerial decisions (if not the decisions themselves) are terms and conditions of employment.[18]

The Court of Appeals seeks to distinguish the effects of a merger from the effects of other types of management decisions.

> "While a merger, too, affects employment security, it does so in a manner somewhat different from that of these other shifts in the corporate enterprise. A merger, unlike a decision to relocate, to shut down a plant, or to terminate operations altogether, does not immediately and directly eliminate jobs. What it does, instead, is substitute a new employer who may not be bound by all the terms of the present collective bargaining agreement, and who may make further management decisions, such as integrating the oper-

[17] The Fourth Circuit stated in *Norfolk & P.B.L.R. Ry.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2nd 34, "... the negotiations required by the Railway Labor Act is the same good faith bargaining required by the Labor-Management Relations Act." 248 F 2nd 34, 45, n. 6.

[18] In the case of the Railway Labor Act, "rules and working conditions".

ations of the two companies, which will eliminate jobs. A merger is different also, in the nature of the decision itself. The other entrepreneurial changes we have discussed are characteristically unilateral, and affect only one firm. A merger, on the other hand, is the result of the decisions of two or more companies, depends on negotiations between the corporations involved, and affects the employees and the business of all the firms joined."[19]

Assuming arguendo that these distinctions are valid, they still have no effect on the company's duty to bargain. Once it is admitted, as the Court of Appeals admits in its decision,[20] that a merger affects employment security, then the Act requires pre-merger bargaining about its effects upon such security.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[19] Court of Appeals decision, p. 14; Appendix A, pp. 22-23.
[20] Court of Appeals decision, p. 14; Appendix A, p. 21.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1038

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS
and
DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS,
PLAINTIFFS, APPELLANTS,

v.

NORTHEAST AIRLINES, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Robert M. Segal and *Plato Papps*, with whom *Segal, Roitman & Coleman* was on brief, for appellants.
Loyd M. Starrett, with whom *Henry E. Foley, David B. Ellis*, and *Foley, Hoag & Eliot* were on brief, for appellee.

April 20, 1972

ALDRICH, *Chief Judge*. On May 12 71, Northeast Airlines, Inc. (NE) entered into a previ and agreement to merge into Delta Air Lines, Inc. (Delta This was the fifth attempt by NE to merge with another li Whatever may have motivated the others, all of which fa for one reason

or another, NE's substantial and continuing deficits seem clearly to have impelled this one. Indeed, it asserts without contradiction that this is its last chance for survival.[1] The agreement has not yet become final. Either party may terminate unless both CAB and stockholder approval is secured prior to the designated consummation date of June 30, 1972. Permission was sought of the CAB by filing on May 12, 1971. Following pre-trial procedures, a trial examiner conducted hearings in July, and on October 26 rendered a report to the Board recommending approval. The Board, as yet, has made no decision. The NE stockholders voted to approve on January 31, 1972. It does not appear from the record whether the Delta shareholders have yet done so.

NE has collective bargaining agreements, one with its mechanics, which expired December 31, 1971 subject to being continued in force by virtue of section 6 of the Railway Labor Act, 45 U.S.C. § 156, and one with its supervisors, which will expire on June 1, 1972. In both instances the union involved is the International Ass'n of Machinists and Aerospace Workers and its District 147, plaintiffs appellants, hereinafter, collectively, the Union. Both of these agreements and their predecessors going back to 1949, have contained what is now Article 3(B), as follows.

> "It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for

[1] To document its plight, NE presented testimony that it had suffered losses in 1969 of $28,843,000, and in 1970 of $10,721,000, and that as of May 31, 1971, it had a negative net worth of $36,616,000. NE further avers that it anticipates continuing substantial losses in 1971 and 1972, and that Storer Broadcasting Company, which has been its major source of financial support, has resolved to provide no further cash advances beyond what is necessary to prosecute the NE-Delta merger.

the protection of employee's seniority and other rights."

No question has hitherto arisen under this clause, although one previous merger progressed even further than the present one before it aborted.

Since the agreement provided for automatic renewal and no change in the contract terms could be made without notice served on or before October 31, 1971, NE on October 28 sent the Union an appropriate section 6 notice of intended termination of the Mechanics' agreement, proposing that the agreement be extended only for "a few months." On October 31 the Union sent its own notice, saying that it wanted the agreement to run a full term, and enclosing a list of further proposals. The enclosure, some six pages long, requested, inter alia, changes in Article 3(B), to provide procedures for premerger negotiations. On November 11, the first meeting resulting from this correspondence, the Union announced that its first request was not for the contract changes it had proposed, but for negotiations for specific postmerger protective provisions, relating to seniority, employment, and other conditions. The company asked time to consider this request. After several further meetings, at which time the position of the parties might be said to have hardened, on December 31, the Union stated that this subject was all it would negotiate, and the company said it was willing to "discuss," and to go to the National Mediation Board or System Board of Adjustment, but that the matter was one which it had no obligation to negotiate.[2] On the basis that the company offered only

[2] Since the Mediation Board does not have exclusive jurisdiction to define the subjects about which an employer has a statutory duty to bargain, *see Pan American World Airways* v. *International Bhd. of Teamsters*, S.D.N.Y., 1967, 275 F.Supp. 986, *aff'd*, 2 Cir., 1969, 404 F.2d 938, we do not see how the company's suggestion to seek its services is pertinent to the case before us, except as revealing a willingness to bargain about the other issues initially raised by the union, not presently relevant.

discussion, with no recognition of a duty to bargain, the Union left the meeting, and on January 24 brought the present suit. Jurisdiction derives from the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

The Union seeks to compel the company to negotiate, and to include in the merger agreement whatever should be the product of the negotiations. It requested a preliminary injunction, in alternative terms.[3]

> "(a) Consummating any merger with the Delta Air Lines, Inc. until the Company has negotiated and bargained in good faith with the Plaintiffs about the proper provisions for the seniority, employment and other rights of the employees of Northeast Air Lines Inc. [sic] represented by Plaintiffs."
>
> "(b) In any manner refusing to negotiate or bargain in good faith with the Plainitffs about the seniority, employment and other rights of the employees represented by the Plaintiffs."

This question was heard on the pleadings and affidavits by the district court which, on February 3, with a comprehensive opinion, denied relief. F.Supp. . The union appealed, unsuccessfully sought interim relief ,and now argues the merits of its appeal.

The district court rested its decision upon a finding that the right of NE's management to decide the company's future outweighed whatever interest plaintiff had in protecting its members. It left unclear to what extent it was relying on particular facts to justify a finding that it would be inequitable to grant the injunction, and to what extent on a broader conclusion that because of the general interests of management and labor the statutory duty did not require bargaining. While we agree that it is appropriate, especially when both parties face irreparable injury, to weigh the com-

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[3] In point of fact, as will be evident, there is little to choose between the two, so far as consequences are concerned.

peting interests, we find it useful to speak in terms of the traditional tests of irreparable injury and probability of success on the merits. *See Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, 115-16, *cert. denied* 391 U.S. 914. In reviewing the district court's opinion, therefore, we shall first examine what we interpret as its finding that the balance of hardship favors denying relief, deferring for the moment the question of whether such relief must be granted nevertheless because an overwhelming case in plaintiff's favor is present on the merits and the equities of the case. *See Dorfmann* v. *Boozer*, D.C.Cir., 1969, 414 F.2d 1168, 1173.

The district court regarded with seriousness, as do we, the possible plight of the Union's membership if their employer is taken over and merged into another whose employees outnumber them twenty to one, which might well discontinue certain NE services, either absolutely, or as duplicative, and which does not, according to the Union, promise certain seniority and other rights that would accrue to its members had NE continued its operations. However, a court of equity must be concerned not only with possible injury to the plaintiff but also with whether an injunction would cause irreparable harm to the defendant, for it is obliged to choose the course likely to cause the least injury. *See Eutectic Welding Alloys Corp.* v. *Zeisel*, D.N.J., 1950, 11 F.R.D. 78, noted in Developments in the Law—Injunctions, 78 Harv.L.Rev. 994, 1056-59 (1965). It would be unrealistic not to view the possible ramifications of an injunction, the most obvious of which is the possible collapse of the merger, and the consequence, which on the record seem inevitable, of the demise of the company.[4] As against this, the consequences to the employees of the merger's accomplishment in accordance with

[4] The parties did not develop with us what benefits the employees would receive from a defunct and bankrupt company.

the present plan do not appear drastic. Extensive labor protective provisions are contained in the order proposed by the CAB examiner. Delta further assumes NE's obligations, which on their face include the obligation imposed by Article 3(B), ante. We cannot at this time measure the cloud that may be cast upon this obligation by the case of *William J. Burns Int'l Detective Agency, Inc.* v. *NLRB*, 2 Cir., 1971, 441 F.2d 911, *cert. granted* 404 U.S. 822, except to say that presently a cloud is all it is.[5] In any event, the employees will fare far better if the merger goes through without the desired negotiations than will the company, not to mention the employees themselves,[6] if it does not go through at all.

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[5] In *Burns*, there may have been no clause in the collective bargaining agreement making it binding on successors and assigns. Several recent arbitration cases have held that where there is such a clause and the successor has notice of it, he is bound by the contract. *See, e.g., Wheeler Bros.*, 1963, 41 Lab. Arb. 844, 850; *Lake States Leasing Corp.*, 1966, 46 Lab. Arb. 935. See generally Shaw & Carter, Sales, Mergers & Union Contract Relations, 19 N.Y.U. 19th Annual Conf. on Labor 357, 373 (1967). In any event, the successor in *Burns* did not purchase his predecessor's company, but simply won a particular contract away from him and retained most of his employees to perform it. That is significantly different from a merger in which the law is generally that the surviving company is bound by the contracts of the one which disappears. *See* 15 Fletcher, Private Corporations (1961 rev. ed.) § 7121. In the present case Delta in the merger agreement expressly assumes the duties of NE.

Even if Delta is not bound by all the terms of the union contract, it may well be obligated by Article 3(B) to bargain with the union about the effects of the merger. The employees' rights under Article 3(B) could be said to vest at the time of the merger and to impose a duty on the employer which must be discharged even after the collective bargaining agreement expires. Under the rule of *John Wiley & Sons, Inc.* v. *Livingston*, 1964, 376 U.S. 543, such an obligation may bind a successor, at least to some extent. *But cf. NLRB* v. *McFarland*, 10 Cir., 1962, 306 F.2d 219.

[6] We do not believe, or even suspect, that the Union wants the merger to fail. Rather, our suspicion is that realizing how strongly other persons desire the merger, the Union feels it may have the leverage to obtain something additional for itself. We do not say that this is wrong. On the other hand, the Union is not possessed with fireside equities.

With these preliminaries we turn to consider the likelihood that an injunction would interfere with the merger. We note first that the Union's conduct has itself enhanced the danger. Its demand to negotiate did not take place until November 11, although the merger agreement was executed in May, and was known to be in the making for some time before then. In July the agreement had been presented to the Board examiner; the Union, we understood in oral argument, had presented its own views, and the examiner had filed a report recommending certain provisions for the protection of the merged employees. For the Union now to seek to negotiate is not only late in the game, but would, if productive from Union's standpoint to the extent of requiring changes in the terms of the merger agreement, require going back to the Board. The merger cannot go through unless the Board decides that its terms, including the provisions for the employees, are in the public interest. 49 U.S.C. § 1378. *See Kent* v. *CAB*, 2 Cir., 1953, 204 F.2d 263, *cert. denied* 346 U.S. 826. The likelihood of this producing difficulties is only too apparent. Since the *United-Capitol Merger Case*, 1961, 33 C.A.B. 306, 342-47, the Board has uniformly applied the same labor protective provisions in every merger and route transfer case. *See American Airlines* v. *C.A.B.*, 2 Cir., 1971, 445 F.2d 891, *cert. denied* 40 U.S.L.W. 3315. These provisions are what the examiner has recommended in the present case, and are what the International Union candidly concedes it is seeking to attack as a matter of policy. Hence the Union's success at the bargaining table would presage probable opposition at the Board level, as well as possible rejection of the merger by Delta either because of the unwillingness of its shareholders to approve the merger on such more restrictive terms, or on the grounds that the terms exceeded "reasonable labor protective provisions of the character and extent previously prescribed" by the Board. Article 5 of Agree-

ment of Merger. Even if both Delta and the CAB approved the changes, the delay would itself be likely to destroy the merger, since the merger agreement expires June 30.

Since, as the district court properly found, an injunction, even to require NE to negotiate, let alone to postpone the merger, threatens damages to NE all out of proportion to those faced by the Union, we must place upon the Union the burden of showing a compelling probability of success on the merits.

The first of the Union's contentions is that Article 3(B) is itself an agreement to conduct premerger negotiations. Insofar as the court's denial of the injunction was based upon a rejection of that interpretation, we believe the court exceeded its jurisdiction. The Railway Labor Act provides specific procedures for the settlement of disputes. Disputes concerning matters about which the parties have a statutory duty to bargain under 45 U.S.C. § 152 First are denominated major disputes and are left to the statutory collective bargaining procedures for settlement. Disputes requiring the interpretation of the terms of a collective bargaining agreement are minor disputes. *See Elgin, J. & E. Ry.* v. *Burley,* 1945, 325 U.S. 711, 722-28. The Act provides that such disputes may be submitted by either party for settlement by a System Board of Adjustment and that the award of the Board is not subject to judicial review. 45 U.S.C. § 184. Because this section vests exclusive jurisdiction in the System Boards of Adjustment, the courts do not have jurisdiction to interpret the terms of a collective bargaining agreement. *Ruby* v. *Pan American World Airways,* S.D. N.Y., 1965, 252 F.Supp. 873, 880, *appeal dismissed,* 2 Cir., 1966, 360 F.2d 691; *Transport Workers Union* v. *American Airlines,* 10 Cir., 1969, 413 F.2d 746.

The courts have no greater power to interpret a contract when the dispute is between a union and an employer than when it is between an individual employee and the company.

See Slocum v. *Delaware, L. & W. R.R.*, 1950, 339 U.S. 239. Nor does it make a difference that here the clause in question arguably imposed a duty to bargain. While courts traditionally define the scope of the statutory duty to bargain, the statute provides no rationale for holding that the Board's authority to interpret a clause committing additional items to bargaining or regulating the procedures for bargaining is less than its general authority. The cases cited by the Union for the proposition that it is for the courts to decide to what settlement procedure the contract commits disputes, *e.g., Textile Workers Union* v. *Lincoln Mills,* 1957, 353 U.S. 448; *Steelworkers Trilogy,* 1960, 363 U.S. 564, were not decided in the context of the Railway Labor Act's express delegation of questions of contract interpretation to the System Boards and are therefore inapposite. The court's error was not inconsequential, for regardless of what interpretation the court would give to a contract clause, it may not on that ground refuse to enjoin a proposed change in working conditions until the Board has had an opportunity to rule whether the change is permitted by the contract.[7] *Cf. Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs,* 2 Cir., 1962, 307 F.2d 21, *cert. denied* 372 U.S. 954.

Nevertheless, we affirm the district court's holding that an

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[7] Although it has long been held that strikes could be enjoined pending resolution of contract disputes by the Adjustment Board, *see Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 1957, 353 U.S. 30, there has been doubt whether an injunction could be issued temporarily barring changes in working conditions. *See generally* Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 386-97 (1960). We believe, however, that the same policies which led the Supreme Court to hold that a court may condition an anti-strike injunction on maintenance of the status quo, *Brotherhood of Locomotive Eng'rs* v. *Missouri - K. - T. R.R.*, 1960, 363 U.S. 528, 534, may also require that a union be able to enjoin changes in working conditions if it would be impossible otherwise later to make the workers whole. *See Local Lodge 2144* v. *REA*, 2 Cir., 1969, 409 F.2d 312; *Westchester Lodge 2186* v. *REA*, 2 Cir., 1964, 329 F.2d 748.

injunction should not issue on the basis of Article 3(B). The Union has not placed the matter before the System Adjustment Board. Since the purpose of an injunction is to preserve the jurisdiction of the Board, this is an inappropriate case to grant such relief.[8] *Westchester Lodge 2186* v. *REA*, ante n. 7, at 753; *Hiibert* v. *Pennsylvania R.R.*, 7 Cir., 1961, 290 F.2d 881, *cert. denied* 368 U.S. 900; *cf. Manion* v. *Kansas City Terminal Ry.*, 1957, 353 U.S. 927. *See also* 29 U.S.C. § 108.

Alternatively, the Union contends that section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, imposes on NE a statutory duty to negotiate with it about the protection to be accorded employees in the event the merger takes place. At the outset, NE argues that the federal courts are without jurisdiction to grant the relief asked in this case because the Union has refused to submit the dispute to the National Mediation Board and because section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First, gives the Board jurisdiction over any such major dispute "not adjusted in conference between the parties or where conferences are refused." We disagree. There can be no doubt as to the court's power generally, when one party refuses to bargain on the ground that it has no duty to do so, to order such bargaining and, if necessary, to enjoin any change in working conditions pending completion of the negotiations. 45 U.S.C. § 156; *Virginian Ry.* v. *System Federation No. 40*, 1937, 300 U.S. 515; *cf. Chicago & N.W. Ry.* v. *United Transportation Union*, 1971, 402 U.S. 570. Judicial relief is not barred in this case by the Union's failure to exhaust administrative channels. The mediation procedures provided for major disputes are designed merely to bring the parties into agreement; they cannot perform the adjudicative function of de-

[8] There is no occasion for us to pursue some quite different arguments that occur to us that might militate against an injunction if the matter *were* before the Board.

ciding whether a party has a legal duty to bargain about a particular subject. *See Pan American World Airways* v. *International Bhd. of Teamsters,* ante.

NE suggests further that since the Union has raised a minor dispute as to whether the collective bargaining agreement requires negotiations about the merger, it cannot simultaneously take the position that there is also a major dispute arising from the merger because, regardless of the contract, there is a statutory duty to bargain. *Cf. Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs,* ante. We might agree if the clause were one, as in *Rutland Railway,* that could arguably be construed as a clear waiver of a statutory right to bargain, but we find no merit in the company's position when the contract may, instead, impose an additional bargaining obligation, and certainly could not be read as an intentional relinquishment of any statutory rights.

We turn, then, to the merits of the statutory argument. Though it does not ask to participate in the decision whether to merge, the Union urges that the court's holding that it cannot bargain about the effects of the merger rests on the faulty premise that the merger itself is non-negotiable. In making this argument, it relies on *Fibreboard Paper Products Corp.* v. *NLRB,* 1964, 379 U.S. 203, in which the Court held that at least some managerial decisions (in that case, subcontracting) may be the subject of mandatory collective bargaining. The Union, however, reads *Fibreboard* too broadly. There the company's decision to contract out maintenance work previously done by its own employees did not alter its basic operations: the work was still to be performed in the same plant; no capital investment was contemplated; the independent contractor was to do the same work as the present employees under similar conditions of employment. Courts have consistently refused to extend the duty to bargain recognized in *Fibreboard* to analogous management decisions which are more central to manage-

ment's autonomous control over the direction of the business' operations.[9]

There are a number of reasons why we believe *Fibreboard* should not be extended to guarantee a union participation in a decision to merge. A merger is initially only a change in the ownership of the company. The impact of such a decision on jobs is not nearly so direct or immediate as the decision to subcontract work. While the change may eventually affect job security, such an effect is not an inevitable one, and could be bargained about separately from the merger itself. *Compare* Note, Automation and Collective Bargaining, 84 Harv.L.Rev. 1822, 1839 (1971). More basically, the decision to merge is much nearer the core of entrepreneurial control. It is the type of decision which Mr. Justice Stewart distinguished in *Fibreboard,* 379 U.S. at 223:

> "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [subject to collective bargaining]."

See, e.g., NLRB v. *Drapery Mfg. Co.,* ante n. 9; *NLRB* v. *Royal Plating & Polishing Co.,* ante n. 9; *NLRB* v. *Transmarine Navigation Corp.,* 9 Cir., 1967, 380 F.2d 933; *General*

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[9] *See Textile Workers Union* v. *Darlington Mfg. Co.,* 1965, 380 U.S. 263 (termination of entire business); *NLRB* v. *Acme Industrial Products, Inc.,* 6 Cir., 1971, 439 F.2d 40 (relocation); *Morrison Cafeterias Consol., Inc.* v. *NLRB,* 8 Cir., 1970, 431 F.2d 254 (decision to shut down part of a business); *NLRB* v. *Drapery Mfg. Co.,* 8 Cir., 1970, 425 F.2d 1026; *NLRB* v. *Royal Plating & Polishing Co.,* 3 Cir., 1965, 350 F.2d 191; *NLRB* v. *Rapid Bindery, Inc.,* 2 Cir., 1961, 293 F.2d 170.

Motors Corp., 191 N.L.R.B. No. 149, 1971 CCH NLRB ¶ 23,264.

To require an employer to include the union, in some cases possibly many unions, in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. *See General Motors Corp.*, ante. Unlike a proposed subcontract, merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining. Nor are the employees in a position to judge the complex financial considerations often involved. The economic necessity for a merger cannot be eliminated by bargaining in the same way as could Fibreboard's need to subcontract its maintenance work. We find no error in the district court's conclusion that the NE merger need not be made the subject of collective bargaining. *See NLRB* v. *Transmarine Navigation Co.*, ante; *Pennsylvania R.R.* v. *Transport Workers Union*, E.D.Pa., 1962, 202 F.Supp. 134; *General Motors Corp.*, ante.

This, however, does not end the matter, for the Union asks to bargain about the impact of the merger on employment conditions rather than about the merger itself. Initially, it can be agreed that employment security falls within the ambit of "rates of pay, rules and working conditions," 45 U.S.C. § 152 First; *see Walker* v. *Pennsylvania-Reading Shore Lines*, 1948, 142 N.J. Eq. 588, 61 A.2d 453, and that employers have an obligation generally to bargain about seniority, severance pay, and other matters relating to employment security. *E.g. NLRB* v. *Frontier Homes Corp.*, 8 Cir., 1967, 371 F.2d 974. It is equally clear that a company must give prior notice to the employees' representatives of any managerial decision which will have an impact on employment security and conditions so that the union will have an opportunity before the change takes place to negotiate

concerning how the employees are to be protected.[10] For example, when a company decides to relocate, although it cannot be required to bargain about whether and where to move, it can be forced to negotiate such matters as whether present employees will be given a right of first refusal, whether they will be paid for relocation expenses if they follow the company, and what economic relief they will be given if they do not. *See, e.g., NLRB* v. *Die Supply Corp.*, 1 Cir., 1968, 393 F.2d 462, 467.[11] We must decide whether in light of these general principles the district court committed a clear error of law in refusing the order requested by plaintiffs.

While a merger, too, affects employment security, it does so in a manner somewhat different from that of these other shifts in the corporate enterprise. A merger, unlike a decision to relocate, to shut down a plant, or to terminate operations altogether, does not immediately and directly eliminate jobs. What it does, instead, is substitute a new employer who may not be bound by all the terms of the present collective bargaining agreement,[12] and who may make further management decisions, such as integrating the operations of the two companies, which will eliminate jobs. A merger is different, also, in the nature of the decision itself. The other entrepreneurial changes we have discussed are characteristically unilateral, and affect only one firm. A merger, on the other hand, is the result of the decisions of two or more

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[10] In the case at bar there is no allegation that the notice given the Union of the merger was insufficient.

[11] *See also Morrison Cafeterias Consol., Inc.* v. *NLRB*, ante n. 9 (partial closing); *NLRB* v. *Drapery Mfg. Co.*, ante n. 9 (complete closing.

[12] See note 5, ante. The danger that a successor employer will not be bound by the specific terms of a collective bargaining agreement one of its constituent corporations had with its employees depends in part on whether the successor integrates the operations of the constituent firms, *see McGuire* v. *Humble Oil & Refining Co.*, 2 Cir., 1966, 355 F.2d 352, *cert. denied* 384 U.S. 988, and therefore is itself the function of management decisions yet to be made.

[illegible] negotiation between the company [illegible] affect the employees until the business of all the firm joined.

Where distinction [illegible] inappropriate to impose on a company about to be acquired by another in a merger an unlimited duty to bargain about the effects of the acquisition on employment security. Since the merger itself is not the proximate cause of job displacement, which will occur only as a result of management decisions subsequently made by the surviving company, any negotiations between the company being absorbed, in this case NE, and its union about what protection the employees should have against such displacement would be recklessly speculative, unless that company has knowledge of and control over the acquirer's plans. *See Martin Marietta Corp.*, 159 N.L.R.B. No. 59, 1966 CCH NLRB ¶ 20,559; *cf. NLRB* v. *Transmarine Navigation Corp.*, ante. The only way NE could regulate the postmerger management decisions of Delta would be to renegotiate the merger. Even were the bargaining to focus entirely on the impact of the merger itself on employment security, renegotiation of the merger would be the likely result. Ignoring the matter of the delay pending bargaining, see ante, renegotiation might be necessary if Delta balked at any highly restrictive employment security terms NE might be forced to agree to.[13] In any event, renegotiation is the only means by which NE could assure its employees that whatever conditions it agreed to would bind Delta.[14] Indeed, the Union's request that the court "issue a judgment directing Northeast . . . to incorporate the results of the . . . bargaining in any final merger agreement with Delta" suggests that renegotiation of the merger is precisely what the Union ultimately seeks.

We do not share the Union's equanimity at this prospect.

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[13] See page 7, ante.

[14] See notes 5 and 12, ante.

To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. We have no doubt but that an employer, bargaining about the effect of a relocation on employment conditions, could refuse to discuss as unreasonable any labor protective terms that would make it prohibitively expensive to move. *See generally* Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1416 (1958). Where it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all. Possibly were the need for negotiation compelling, we would feel differently, but in this case where Delta's employees, who would have no opportunity to participate, could be injured by whatever benefits NE's employees secure in premerger negotiations with their own employer, need points both ways.

Our discussion of the duty to bargain about the effects of a merger on employment conditions has so far been general. We have deferred until now the question of whether the regulation of the airline industry by the Civil Aeronautics Board in any way alters the scope of the duty. As we have pointed out, the Civil Aeronautics Act permits only those airline mergers which are found by the CAB to be not inconsistent with the public interest. 49 U.S.C. § 1378. The Board, in executing its responsibility, may condition approval of the merger on certain changes in and integration of the operations of the combining airlines. While this strengthens the proximity between the merger and its employment effects, that alone does not require that we expand the scope of bargaining to include postmerger working con-

ditions. The effects of the NE-Delta merger still depend on changes the nature of which are not at present known, because the CAB has not yet issued its order. Indeed, since the merger cannot proceed without CAB approval, requiring NE to bargain over its effects in this case would be even more likely to deprive NE of control over the decision to merge than it would an unregulated company. In an unregulated industry, if highly restrictive labor protective provisions in a collective bargaining agreement make unfeasible certain planned postmerger operating changes, the acquiring corporation may still be willing to proceed with the acquisition, foregoing the originally planned changes. This option is not available in an airline merger where the parties may not subsequently decide not to make changes on the proposals of which the CAB may have relied in approving the merger. In such circumstances, the bargaining might either be ineffectual, if the Board order displaces the collective bargaining agreement even to this extent, *cf. Kent* v. *CAB*, ante, or might interfere with the decision to merge. This latter effect, in addition to being contrary to our conclusion that an employer generally may not be required to bargain about the merger itself, would be inconsistent with the design of the economic regulation of the airline industry. The Civil Aeronautics Act authorizes the CAB to condition approval of airline mergers on the acceptance by the parties of labor protective provisions designed to protect the employees of the merged airlines from any adverse impact the merger may have on conditions of employment, *see Kent* v. *CAB*, ante at 265, and also to establish machinery for the peaceful settlement of any labor-management disputes arising out of the merger. *See American Airlines, Inc.* v. *CAB*, ante. One of the policies behind this grant of authority to the CAB is to prevent mergers adjudged by the Board to be in the public interest from

being obstructed by labor disputes.[15] Because of the danger of such obstruction, courts have held that the procedures of the Railway Labor Act are not available for disputes arising out of a merger which pertain to subjects covered by the Board's labor protective order, and should therefore, instead, be resolved by the procedures set forth in that order, even though the parties have, in private collective bargaining contracts, agreed to terms inconsistent with the order. *See Kent* v. *CAB*, ante; *American Airlines, Inc.* v. *CAB*, ante; *cf. Nemitz* v. *Norfolk & W. Ry.*, 6 Cir., 1971, 436 F.2d 841, 845-48, *aff'd*, 404 U.S. 37, 44. We believe, likewise, that the duty to bargain, even about terms which would supplement the CAB order,[16] must be limited in such a way as to assure that the negotiations will not jeopardize a merger approved by the CAB. Therefore, even matters which the company would otherwise have to negotiate under our interpretation of the Railway Labor Act, may be excluded from the negotiations if bargaining, with its corollary of a right to strike, would have the effect of somehow jeopardizing the merger.

We conclude, therefore, that NE cannot be required to bargain about the protection to be accorded its employees in the event of particular postmerger operating changes to be mandated by the CAB or to be made by Delta, nor about the employment rights of NE employees vis-a-vis Delta em-

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[15] While the legislative history of the Civil Aeronautics Act is silent on this point, the scheme of the economic regulation of the airline industry is borrowed in large part from the regulation of the rail industry by the Interstate Commerce Act. 49 U.S.C. §§ 1 *et seq.* The history of that Act does evidence a concern that labor disputes arising from rail consolidations be subject to authoritative resolution in order that economically desirable mergers not be obstructed. *See Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 8 Cir., 1963, 314 F.2d 424, *cert. denied* 375 U.S. 819; *Railway Labor Exec. Ass'n* v. *United States*, 1950, 339 U.S. 142, 150-54.

[16] A private agreement supplementing the Board's order may be enforceable, *see Arnold* v. *Louisville & N. R.R.*, M.D.Tenn., 1960, 180 F.Supp. 429, *aff'd sub nom. Batts* v. *Louisville & N. R.R.*, 6 Cir., 1963, 316 F.2d 22, even though one inconsistent with the order is not. *See Kent* v. *CAB*, ante; *Nemitz* v. *Norfolk & W. Ry.*, ante.

ployees.[17] The Union having asked below, and argued here, for an all-or-nothing order, we do not feel called upon to consider what, if any, incidental matters it might be appropriate to bargain about,[18] except to say that even as to such matters, NE may, without violating its duty under 45 U.S.C. § 152 First to negotiate reasonably, refuse to incorporate any agreements reached into its merger agreement with Delta and may also refuse to discuss any terms which in its good faith opinion would force renegotiation of the merger or otherwise jeopardize its consummation.

Since NE had no obligation to bargain generally about the merger and its effects, the district court properly exercised its discretion not only in refusing to order NE to bargain, but also in declining to enjoin the merger pending completion of negotiations. There is no statutory command that the merger be enjoined. Section 6 of the Railway Labor Act, 45 U.S.C. § 156, barring any changes in working conditions during the course of bargaining, does not apply because, as we have already held, the merger itself is not a change in working conditions. Since an injunction, in part because of the Union's conduct, would be potentially disastrous, see ante, it would be inequitable to issue one simply to guarantee the Union an opportunity to bargain as to incidental matters.

Affirmed.

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[17] We express no opinion at this time as to whether Delta may be required to negotiate separately with NE workers about any of the changes when they occur. *See Overnite Transportation Co.* v. *NLRB*, 4 Cir., 1967, 372 F.2d 765, 768, *cert. denied* 389 U.S. 838; *cf. Mine Workers* v. *NLRB*, 7 Cir., 1963, 319 F.2d 428, *rev'd on other grounds* 375 U.S. 396; *NLRB* v. *McFarland*, ante.

[18] Although NE expressed some willingness to bargain about incidental matters, the Union, by refusing apparently to negotiate about anything until NE agreed to various demands, including, most strikingly, a consolidated seniority list comprehending the employees of both companies, which we have held to be outside the scope of any duty to bargain, made it impossible to know the extent of NE's willingness. We would be flying blind were we to try now to define the scope of the duty to negotiate incidental matters.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72-1038.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ET AL.,
PLAINTIFFS, APPELLANTS,

v.

NORTHEAST AIRLINES, INC.,
DEFENDANT, APPELLEE.

JUDGMENT

Entered April 20, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

Enter:
(s) ALDRICH, CH. J.

[cc: Messrs. Segal and Starrett.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 73-303-L.C.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
AND
DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
PLAINTIFFS,
v.
NORTHEAST AIRLINES, INC.,
DEFENDANT.

MEMORANDUM AND ORDER
February 3, 1972

CAMPBELL, D.J.

This case was heard on January 27, 1972 on an application for a temporary restraining order and a preliminary injunction. The issues were submitted on plaintiffs' verified complaint, affidavits from all parties, and briefs.

After consideration, and for reasons set forth below, the Court concludes that it must deny injunctive relief to the plaintiffs.

I

The plaintiffs, International Association of Machinists and Aerospace Workers (IAM) and District 147 of IAM, request a preliminary injunction (1) restraining the defendant, Northeast Airlines, Inc. (Northeast) from consummating any merger with Delta Air Lines, Inc. (Delta), until Northeast has negotiated with and bargained in good

faith with them about the "proper provisions for the protection of employees' seniority, employment and other rights", and (2) directing Northeast to negotiate with and bargain in good faith with them about the protection of employees' seniority, employment and other rights.

The relief ultimately sought by the plaintiffs in this action, in addition to the above injunctions, is "a judgment directing the defendant, Northeast Airlines, Inc., to incorporate the results of the negotiations and good faith bargaining with the plaintiffs in any final merger agreement with Delta Air Lines, Inc." (Prayer (4))

II

The plaintiffs cite the following Article III(B) of two collective bargaining agreements with Northeast, one dated April 18, 1969, covering employees in the mechanics' craft, and the other dated November 6, 1969,[1] covering supervisory employees:

> "It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company [Northeast] for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights."

The plaintiffs also rely upon the provisions of 45 U.S.C. Sec. 152 First, reading as follows:

> ". . . It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to

[1] Northeast's collective bargaining agreement with the mechanics expired December 31, 1971, but its terms continue in effect under provisions of the Railway Labor Act (45 U.S.C. Sec. 156). That with the supervisory employees continues by its terms until at least June 1, 1972.

settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

III

For purposes of the matter now before me, the most relevant facts appear to be as follows:

On May 12, 1971, Northeast and Delta, pursuant to resolutions of their boards of directors, entered into a formal merger agreement, a copy of which is before the Court. Northeast's decision to merge was an outgrowth of what it represents to be its desperate financial plight (detailed in an exhibit to the Peterson affidavit). Northeast on May 31, 1971 had a negative net worth of $36,616,000. It is undisputed that Northeast, a small, mainly regional carrier, is, and has for some years been, in acute financial distress. There is nothing before me to contradict Northeast's assertions that the merger is essential to its survival.

The merger agreement provides that the two corporations shall be combined by merging Northeast into Delta. After the merger, the surviving corporation, Delta, is to be governed by a board of directors consisting of Delta's board on the date of the merger plus two named individuals. The share-holders of Northeast will receive fractional shares of Delta's stock. Delta is larger than Northeast. Northeast will, in effect, be absorbed into Delta. Northeast's employees represented by IAM number about 1,000. Delta has 20, 786 employees, none of whom, with the exception of the pilots, are members of a union.

The merger agreement provides that the merger will become effective upon filing and recording of the agreement in Delaware. This is to occur as soon as practicable after approval of the merger by the stockholders of the two corporations and by the C.A.B. under sections 408

and 801 of the Federal Aviation Act of 1958.* (A meeting of the stockholders of Northeast was scheduled for January 31, 1972, at which time the question of approval of the merger agreement was scheduled to be acted upon.) The agreement terminates if the merger is not approved by the C.A.B., by the latest, June 30, 1972. (See par. 15, (a)(3).)

The merger agreement contains provisions imposing liability upon Delta, after the merger, for all of Northeast's obligations, liabilities and duties, and transferring to Delta all of Northeast's rights and property.

The agreement also contains a clause entitled "Labor Protective Conditions". This provides that the surviving corporation will accept "reasonable labor protective provisions of the character and extent previously prescribed by the Civil Aeronautics Board". The Civil Aeronautics Board's trial examiner has written extensive labor protective provisions (Peterson affidavit, exhibit 7), which, according to the defendant (memorandum, p. 11), will be incorporated into any final Civil Aeronautics Board order approving merger. The merger agreement further provides that after the date of the merger, Delta will retain as its employees such employees of Northeast as is consistent with economic and efficient performance of the expanded operations of Delta, and will endeavor to provide continuing employment for them with Delta. Group insurance and retirement benefits for former Northeast employees are to be determined pursuant to existing Northeast plans.

It was asserted by counsel for Northeast, and not disputed, that the proposed merger was common knowledge prior to the execution of the May 12, 1971 agreement, and that the making of the agreement itself was also commonly known immediately thereafter.

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* 49 U.S.C. Secs. 1378, 1461

It is asserted by Northeast (Peterson affidavit) that in 1945, 1950, 1960 and 1964, mergers of Northeast with other airlines were negotiated or agreed to, although never consummated. In November 1969, Northeast entered into a merger agreement with Northwest Airlines, Inc. That agreement, although approved by the C.A.B., was terminated by Northwest early in 1971. Mr. Peterson asserts in his affidavit that the plaintiffs never demanded negotiations in connection with any of the above proposed mergers, even though Article III(B) has been in every contract with them since April 1, 1949.

On October 28, 1971, the company sent the union a so-called "Sec. 6 Notice" (notice pursuant to Section 6, Title I of the Railway Labor Act, as amended; 45 U.S.C. Sec. 156) stating its intention to propose a change in the existing mechanics agreement, which would extend the agreement "for a period of a few months". (Exhibit 2A of the verified complaint.) On October 31, 1971, the union, pursuant to Sec. 6, notified the company of its proposed changes. (Exhibit 2B of the verified complaint. In neither letter was there mention of the Northeast-Delta merger; however, among the union's proposed changes in the agreement was an expansion of Article III(B) to set forth procedures for negotiations before any merger should occur. (Orlando affidavit, exhibit 2C.)

Negotiations on a new contract opened on November 11, 1971, at which time the union representative, William J. Sutherland, asked for immediate negotiations, pursuant to Article III(B) of the existing agreement, for post-merger protective provisions for Northeast employees. (Complaint, exhibit 4.) The Northeast representative, Herbert E. Orlando, replied that he was uncertain whether or not his company was "prepared to negotiate" and would consult with Northeast's officers. (Orlando affidavit, p. 3.) According to Sutherland, Northeast on November 22, 1971

again refused to answer his request for negotiations, saying Delta would be consulted. Northeast maintains that in all encounters subsequent to the November 11 meeting, it has told the union that, though not obligated under Article III(B) to negotiate prior to merger, "it would be willing to discuss all such issues". (Orlando affidavit, p. 3.) On December 17, 1971, responding to Sutherland's letter of December 2 demanding negotiations (Complaint, exhibit 4.), Orlando stated: ". . . we are prepared in the future, as we have on several days in the past, to discuss fully the issues referred to in your letter as well as other matters about which we are bargaining." (Sutherland affidavit, exhibit 2.) Presumably such issues were those arising under Article III(B). However, the company has always maintained that it was not obligated to bargain over any terms of employment under Delta and Orlando says that he has "stated candidly that [he does] not see how an agreement on post-merger conditions can be reached prior to the approval and consummation of the merger". (Orlando affidavit, p. 3.) According to Sutherland, on the other hand, the company consistently refused to negotiate protective provisions up to and including the last meeting of the parties on December 21, 1971. (Sutherland affidavit, p. 3.) At that meeting the union broke off further negotiations over proposed changes in the collective bargaining contract. (Orlando affidavit, p. 4.)

On December 28, 1971, Northeast filed an application before the National Mediation Board, requesting mediation of the dispute over pre-merger negotiations (as well as mediation of the dispute over the union's proposed changes in the contract). (Orlando affidavit, exhibit 6.) The union, having sought the services neither of the Mediation Board nor of the System Board of Adjustment, filed this action here on January 24, 1972.

IV

Turning from the facts to the substantive issues, I believe that, in the final analysis, my decision must rest upon a balancing of the plaintiffs' interest in protecting its members by bargaining to the fullest extent, against the right of Northeast's management to decide the future of that financially ailing airline.

If the union receives the injunctive relief requested, the merger (which was agreed to between Delta and Northeast in a binding contract six months before the union adopted its present posture) will be postponed and may even be aborted. If, on the other hand, no relief is granted, the merger may shortly occur — not, as hereafter indicated, with necessarily worse consequences to the employees, but at least without their having been able to attempt to influence the express terms of the merger agreement itself.

At this moment in time, under the particular facts and circumstances, I conclude that Northeast's right to proceed, unhampered, with the merger should prevail. I reach this result without in any way belittling the union's concern over the consequences to its members of the merger. The merger and its consequence are of obvious importance and seriousness to the employees of Northeast.

In stating that the primary issue involves a determination of competing interests, I do not suggest that there are not other issues. Some, such as the late timing of the union's demands and the lack of a clear showing by the union of irreparable harm, are intimately related to the weighing of competing equities. Others, such as the question of exhaustion of remedies under the bargaining contracts and under the Railway Labor Act, raise independent issues which might constitute alternative grounds for decision but which I do not believe need be reached.

V

It is crucial to have in mind the precise injunctive relief sought and the ultimate object, asserted in the complaint, of this litigation.

The plaintiffs argue that their aim is merely to cause Northeast to engage in good faith bargaining over post-merger seniority and employment — that their request is merely, as it were, to reopen lines of communication with Northeast. By themselves, these are reasonable enough demands.[2] However, the relief sought to accumplish these results is rather less innocuous.

The plaintiffs seek an injunction enjoining "Northeast from consummating any merger" with Delta (pursuant to its outstanding contract) until it has bargained and negotiated with the plaintiffs in good faith about the proper provisions for protection of employees' seniority, employment and other rights. Further, the complaint makes clear that the aim of the bargaining is not the usual one of a new collective bargaining agreement between the union and Northeast. Rather the Court is ultimately to "issue a judgment directing . . . Northeast . . . to incorporate the results of the . . . bargaining in any final merger agreement with Delta". This judgment is to issue although Delta is not a party to this proceeding.

Since Delta cannot be required to agree to a change in the terms of the present contract, and since Delta, the larger and stronger of the two airlines, might well be expected to decline such a change in terms, the ultimate relief

[2] It is to be noted that the union, not Northeast, broke off negotiations in late December. The union thereafter rejected the company's request for mediation by the National Mediation Board and has refused to invoke the so-called "minor dispute" procedures in the bargaining contracts and in the Railway Labor Act. Northeast asserted in Mr. Orlando's letter of December, 1971 that it was fully prepared to discuss all the issues. However, Orlando also told the union that he did not see how an agreement on post-merger conditions could be reached prior to approval and consummation of the merger.

requested might have the effect of aborting the merger. Indeed, even an injunction postponing the merger indefinitely could have that effect, since Delta is not required to waive timely performance by Northeast.

Thus the plaintiffs seek far more than an order reopening channels of negotiation. To secure what they assert to be their bargaining rights, they demand that the Court subordinate Northeast's rights under the merger agreement and imperil the merger itself.

VI

The plaintiffs rest their claims for relief upon 45 U.S.C. §152 First and upon Article III(B) of the collective bargaining contracts. (Both the statute and contract provision are quoted above.)

Section 152 First requires carriers to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes." This language requires carriers to bargain and negotiate in good faith. Nonetheless, the duty to exert every reasonable effort to make and maintain agreements does not, I believe, go so far as to require a carrier to postpone, renegotiate and jeopardize its rights under a pre-existing merger agreement upon the insistence of its employees.

The decision to merge, like the decision of an enterprise to invest in labor-saving machinery or to liquidate, is a managerial decision. See *Fiberboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 223 (1964) (concurring opinion of Justice Stewart, with Justices Harlan and Douglas).

The Court said in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549 (1964):

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the em-

ployees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations . . . ."

Management's position is strengthened in this case by the fact that the plaintiffs waited for six months after execution of the present merger agreement to demand negotiations. While the seniority, employment and other rights which they wish to bargain for are their legitimate concerns, the relief they now seek would have an impact far beyond the specific matters they wish to negotiate. Delta is, of course, under no obligation to postpone the merger or to accept a new merger agreement or to abandon its rights under the old one. If relief is granted, the management of Northeast would be deprived of a substantial measure of control over the decision to merge itself.

This is not to say that the plaintiffs may not bargain for a new collective bargaining contract which may have provisions relating to seniority and other matters surviving the merger. Under Article III(B), the existing collective bargaining contract is declared to be binding upon Northeast's successors and assigns. It, or a successor agreement, may well be enforceable after the merger. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Arbitrators have often held that, where the acquiring company is on notice of a successors and assigns clause, it is bound by the terms of the contract. *See*, e.g., *Wheeler Bros.*, 41 Lab. Arb. 844, 850 (1963), *Lake States Leasing Corp.*, 46 Lab. Arb. 935 (1966), *Sanborn's Motor Express, Inc.*, 44 Lab. Arb. 346 (1965).

It is true that the court in *Burns Int. Detective Agency* v. *NLRB*, 441 F.2d 911 (2nd Cir. 1971), held that a successor is not bound by all the terms of the pre-existing contract. But it appears that the contract may not have included a successors and assigns clause. The opposite result was, in any event, reached in *Ranch-Way, Inc.* v.

NLRB, 445 F.2d 665 (10th Cir. 1971). The Burns case is now before the Supreme Court.

Moreover, Northeast represents that the C.A.B., which must approve the merger, will, in its decision, afford employees protective provisions such as those set forth extensively in a report of the C.A.B. hearing examiner. (Defendant's Memorandum, p. 11, Peterson affidavit) *See* 49 U.S.C. §1378(b). The C.A.B., as part of its statutory authority to regulate the merger of air carriers, has extensive power to order the integration of employees. The C.A.B.'s rulings as to the placing of employees on seniority lists may even supersede the provisions of a collective bargaining agreement. *Kent* v. *Civil Aeronautics Bd.*, 204 F.2d 263 (2nd Cir. 1953), *cert. denied* 346 U.S. 826 (thus making it questionable whether and to what extent arrangements made at this time between Northeast and the plaintiffs would be useful or feasible).

In any event, I do not construe Northeast's reluctance, at this late hour, to place on the bargaining table items which would involve a renegotiation of the previously executed merger agreement with Delta as unreasonable or as in violation of the provisions of Section 152 First.

VII

The plaintiffs further rely upon Article III(B) of the two collective bargaining contracts now in effect.

The first sentence of the clause provides that the collective bargaining contract shall be binding upon the successors and assigns of Northeast. The second sentence states:

> "In case of a consolidation or merger, representatives of the company and union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights."

It is not clear (especially in context of the preceding sentence) whether this second sentence calls for negotiations

after a merger or before. Furthermore, there is nothing in the sentence or in the collective bargaining contracts themselves which binds the company not to merge on its own, rather than the union's, timetable. The contracts nowhere expressly condition a merger upon the holding of prior bargaining sessions. (The absence of such language may be contrasted with specific provisions in Article III(C) prohibiting strikes and lock-outs pending the attempts to settle disputes through established procedures).

If one assumes, notwithstanding the dispute and grievance procedures in the contract and in the Railway Labor Act, that this Court now has the authority to interpret this sentence, I would conclude that the language does not go so far as to give to the Union a mandatory voice in the negotiating of the merger. If the contract was intended to condition the right to merge upon satisfactory advance bargaining concerning the terms of the merger, one would expect it to have said so.

The failure of the union to request pre-merger negotiations in five previous instances of contemplated mergers, and the fact that it did not raise the present issue until six months after the Delta merger agreement was executed, is consistent with the foregoing interpretation.

One can argue, of course, that while the right to merge is not conditioned upon advance bargaining, the practical circumstances of this case justify an injunction as the only means of enforcing the union's contractual right to negotiate with the company concerning proper provisions for the protection of employees' rights. But given the accepted notion that merger is a management decision, the "ambiguity of the clause, the serious potential impact" of an injunction upon Northeast and its future existence, and the other equities and circumstances, I am unable to reach that result.

Northeast, of course, contends that the interpretation

of this clause, like the other contract provisions, is a matter for the System Board of Adjustment, as a so-called minor dispute. The union has not placed the matter before the Board, nor is it willing to accept mediation by the National Mediation Board. One may question whether the union, as a precondition to the injunctive relief sought, has made "every reasonable effort" to settle this dispute, using the procedures of the Railway Labor Act and the contracts. 29 U.S.C. §108.

The union contends that the dispute is not a minor one, and relies upon *Chicago & Northwestern Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). (In that case, the Court specifically noted that the parties had exhausted the formal procedures of the Railway Labor Act.)

Even assuming, without deciding, that the union is right, I do not interpret Article III(B), any more than I do 45 U.S.C. §152, as conferring upon the union, under the present circumstances, the right to the relief sought in this suit: namely, to enjoin the consummation of the Delta merger pending negotiations between Northeast and itself and a final "judgment directing the defendant, Northeast Airlines, Inc., to incorporate the results of the negotiations and good faith bargaining with the plaintiffs in any final merger agreement with Delta Air Lines, Inc." (Prayer (4))

VIII

Since even on the legal posture most favorable to the plaintiffs, I do not believe that the plaintiffs have a reasonable probability of success, I am of the opinion that a preliminary injunction may not issue.

I further conclude that the plaintiffs have failed to demonstrate that they and the employees they represent will suffer irreparable harm if the requested injunctive relief is denied. Even if Delta will not be bound by the existing or later negotiated collective bargaining agreements, and

even if the C.A.B. does not afford the employees adequate protection, it is by no means clear that bargaining with Northeast at this time can accomplish important lasting results. There is little assurance that Delta would accept more favorable labor provisions than it would later accept, or that Northeast would be in a position to require Delta to accept them. Northeast is the weaker of the two companies, and would seem to be in a poor position to force a renegotiation of the merger agreement. What could occur — to the ultimate likely detriment of all concerned, including the public — is the collapse of the merger and the possible eventual collapse of Northeast. As against the highly speculative gain to the employees of an injunction, one must weigh the more positive danger to Northeast's future existence should the merger be aborted.

Preliminary injunction denied.

United States District Judge

BEST COPY

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MICHAEL RODAK, JR.

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1498

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
PETITIONERS,

v.

NORTHEAST AIRLINES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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No. 71-1498

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
PETITIONERS,

v.

NORTHEAST AIRLINES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent respectfully submits that the issues which would be presented in this case are not worthy of consideration at this time and therefore the Petition should be denied.

Opinions Below

The opinion of the United States District Court for the District of Massachusetts which denied a preliminary injunction (Appendix C of the Petition) is reported at 337 F. Supp. 499. The opinion of the Court of Appeals for the First Circuit affirming that denial (Appendix A of the Petition) is reported at —— F.2d ——.

Jurisdiction

The jurisdictional requisites are set forth adequately in the Petition.

Questions Presented

Was the District Court's denial of petitioners' request for preliminary injunctive relief an appropriate exercise of that court's discretion in view of the absence of irreparable injury to the petitioners, the risk of irreparable harm to respondent and to the public interest, and petitioners' failure to demonstrate a probability of success on the merits?

Are the courts without jurisdiction to adjudicate a dispute concerning the interpretation of provisions in collective bargaining agreements made pursuant to the Railway Labor Act when the petitioners have submitted the dispute to the System Board of Adjustment and it is presently pending before that Board?

Statutes Involved

Section 408 of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1378) provides in relevant part as follows:

"(a) It shall be unlawful unless approved by order of the Board as provided in this section—

"(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships . . . .

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

Section 6 of the Railway Labor Act (45 U.S.C. § 156) provides in relevant part as follows:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules,

> or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice."

Section 204 of the Railway Labor Act (45 U.S.C. § 184) provides in relevant part as follows:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of ... this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of [Section 3, Title I, of that Act.]"

Statement

This litigation involves the request of unions representing certain employees of Northeast Airlines, Inc. ("Northeast") for injunctions against the proposed merger of Northeast with Delta Air Lines, Inc. ("Delta") and ultimately for a judgment directing modification of the Northeast-Delta merger agreement. The United States District Court for the District of Massachusetts denied petitioners' motion for a preliminary injunction on February 3, 1972, and the Court of Appeals for the First Circuit affirmed that denial on April 20, 1972.

The International Association of Machinists and Aerospace Workers and its District 147, the petitioners, brought the present action in the District of Massachusetts on Jan-

uary 24, 1972 seeking, *inter alia,* to enjoin the Northeast-Delta merger until the respondent Northeast "negotiated and bargained in good faith with the [petitioners] about the proper provisions for the seniority, employment and other rights of the employees of Northeast Air Lines, Inc. [sic] represented by" petitioners[1] with respect to such employees' service after the merger occurs. The petitioners further seek "a judgment directing the defendant, Northeast Airlines, Inc., to incorporate the results of the negotiations and good faith bargaining with the plaintiffs in any final merger agreement with Delta Air Lines, Inc." However, Delta was not joined as a defendant and has not been a party to these proceedings.

On May 12, 1971 Northeast and Delta entered into a merger agreement containing, among other provisions, a "Labor Protective Conditions" clause, under which Delta promised to accept "reasonable labor protective conditions" to be prescribed by the Civil Aeronautics Board ("CAB"). The CAB, after hearings and argument in which petitioners participated actively (see p. 41 *infra*), approved the Northeast-Delta merger upon various conditions in a decision dated April 24, 1972. This decision was released only after Presidential approval was given to the merger on May 19, 1972 (see p. 47 *infra*).

Among the conditions imposed by the CAB were extensive labor protective conditions concerning seniority and other interests of employees which might be affected by a merger

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[1] Petitioners represent two separate groups of employees of Northeast: A group of mechanics and related employees are covered by a collective bargaining agreement which expired by its terms on December 31, 1971 but, in effect, continues in force as the "status quo" pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. § 156, by reason of the pendancy of negotiations. A second group of technical services department foremen and field service technicians is covered by a separate contract which expired June 1, 1972; the "status quo" provisions of Section 6 are now applicable to this group as well.

(see pp. 29-40 *infra*). For example, the CAB's Labor Protective Provisions require that seniority rights be adjusted "in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." (Section 3, p. 30 *infra*). Section 11 of the Labor Protective Provisions (pp. 38-39 *infra*) establishes a procedure for 45 days' written notice of proposed changes as a result of the merger and for negotiations upon request. If a dispute concerning the effects of the merger on employees remains unsettled for 20 days after the controversy arises, it may be referred by any party, under Section 13(a) of the Labor Protective Provisions (pp. 39-40 *infra*), to an arbitrator for an expedited determination.

The basis of the petitioners' suit as it was presented in the District Court was that, in paragraph (B) of Article 3 of the collective bargaining agreements, respondent contractually agreed to bargain with petitioners prior to a merger concerning the effects of the merger on employees' seniority and other rights. Article 3(B) of each agreement reads as follows:

> "It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employee's seniority and other rights."

On October 28, 1971, respondent sent petitioners a written notice, pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), proposing that the then-existing agree-

ment covering the group of mechanics and related employees be extended "for a period of a few months". On October 31, 1971 petitioners, in compliance with Section 6, gave respondent written notice of numerous proposed changes. However, the merger of the respondent with Delta was not mentioned in either notice. No Section 6 notice relating to the group of foremen and technicians was given until the end of March—long after this litigation began—and even that notice did not mention the Northeast-Delta merger.

Negotiations for a new contract commenced November 11, 1971, and it was at that time, orally and without any forewarning, that petitioners first demanded immediate negotiation about post-merger protective provisions.[2] Respondent's position, communicated orally at subsequent sessions and confirmed by letter on December 17, 1971, was that respondent was "prepared . . . to discuss fully the issues" while maintaining that, as the Company interpreted Article 3(B), it was not obligated to negotiate concerning post-merger matters before the merger was consummated. At the bargaining session held December 21, 1971, the unions broke off negotiations and walked out of the meeting; accordingly, on December 28, 1971, the respondent duly filed an application with the National Mediation Board requesting mediation.

Subsequent to the decision of the Court of Appeals in the present litigation, petitioners submitted the dispute concerning the interpretation and application of Article 3(B) to the System Board of Adjustment, and the matter

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[2] Although the Petition in this Court argues that petitioners should have a right to negotiate about the decision whether Northeast and Delta should merge, in fact petitioners had never even requested discussions of that subject. Nor does petitioners' Complaint contain any allegations or prayers relating to negotiations concerning the decision to merge.

is presently pending before that Board. Copies of the grievance which was submitted and petitioners' request for accelerated hearing by the System Board are annexed as Appendix B of this Brief (pp. 48-49 *infra*).

Argument

The present Petition asks this Court to review interlocutory decisions of the courts below refusing to grant a preliminary injunction which would prevent the proposed Northeast-Delta merger. In light of the necessity of that merger to the air transportation system, particularly in the northeastern United States,[3] and petitioners' long delay before even informally requesting negotiations, there can be no doubt that the refusal of a preliminary injunction was a sound exercise of the discretion of the courts below.

Moreover, as the court below correctly held, all questions presented by the Complaint and the facts alleged therein are matters which, with respect to the air transportation industry, Congress entrusted to special administrative bodies. The CAB was charged with determining the questions of protection of employees' rights in connection with the Northeast-Delta merger, including related procedures for settling disputes by negotiation and/or arbitration, and the CAB decision in fact established detailed rules answering those questions. The interpretation of respondent's contractual undertaking in Article 3(B) of its agreements with petitioners is within the exclusive jurisdiction of the System Board of Adjustment and is now pending before that Board.

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[3] As the CAB's findings (pp. 22-24 *infra*) demonstrate, the Northeast-Delta merger is essential to the continuance of the service now provided by Northeast.

I. THE TERMS AND CONDITIONS OF A MERGER BETWEEN AIR CARRIERS, INCLUDING EXTENSIVE CONDITIONS FOR PROTECTION OF AFFECTED EMPLOYEES AND FOR SETTLEMENT OF DISPUTES WITH RESPECT THERETO, ARE MATTERS ENTRUSTED BY CONGRESS TO THE DISCRETION OF THE CIVIL AERONAUTICS BOARD, AND THAT DISCRETION HAS NOW BEEN EXERCISED IN THE PRESENT CASE.

The Court of Appeals, in affirming the District Court's denial of petitioners' request for injunctive relief, relied upon the Congressional determination, embodied in Section 408 of the Federal Aviation Act, that the terms and conditions of a merger between air carriers, including all conditions relating to the protection of employees affected by such merger, are matters entrusted to the informed discretion of the Civil Aeronautics Board. *Kent* v. *CAB*, 204 F.2d 263 (2nd Cir. 1953), *cert. denied*, 346 U.S. 826; *American Airlines, Inc.* v. *CAB*, 445 F.2d 891 (2nd Cir. 1971), *cert. denied*, — U.S. — (1972). A decision of the CAB pursuant to Section 408 may not be attacked collaterally. To the extent that judicial review of the CAB Orders is available, see *Chicago & So. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, it must be challenged by a statutory petition for review pursuant to 49 U.S.C. §1486, not by a suit like the present litigation.

In fact, the CAB has considered petitioners' evidence and arguments and has now determined what Labor Protective Provisions should be established for Northeast employees affected by the merger. Indeed, the CAB has spelled out in detail the methods for adjusting any questions concerning the effects of the merger on employees by negotiations and/or arbitration. In the light of the CAB decision, the question the Petition seeks to present to this Court plainly has no real significance.

II. THE ISSUE OF PETITIONERS' RIGHTS PURSUANT TO ARTICLE 3(B) OF THE AGREEMENTS IS WITHIN THE EXCLUSIVE JURISDICTION OF THE SYSTEM BOARD OF ADJUSTMENT, AND PETITIONERS HAVE NOW SUBMITTED THE DISPUTE TO THE SYSTEM BOARD.

As is apparent from their Complaint, petitioners brought the present action to enforce a duty to bargain petitioners contend is stipulated in Article 3(B) (quoted on p. 6 *supra*) of the collective bargaining agreements between petitioners and respondent. Respondent argued first to the District Court and then to the Court of Appeals that the courts were without jurisdiction to grant the relief prayed in the complaint in that the System Boards of Adjustment is vested by Congress with exclusive primary jurisdiction to determine the petitioners' claim. *Slocum* v. *Delaware, L. & W.R.R.*, 339 U.S. 239; *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548. The District Court assumed jurisdiction solely in order to resolve the issue of contract interpretation against the petitioners. (Petition p. 40). The Court of Appeals, however, held that the courts do not have jurisdiction to interpret the paragraph in question (Petition p. 17). The correctness of that ruling was subsequently confirmed by the decision of this Court in *Andrews* v. *Louisville & N. R.R. Co.*, — U.S. — (May 15, 1972), where the Court closed the only loophole in the universal principle that a dispute involving the interpretation and application of a provision of an existing contract entered into as a result of bargaining pursuant to the Railway Labor Act must be resolved through the established arbitration procedures—in the air transportation industry, the System Board of Adjustment.

Subsequent to the First Circuit's decision, petitioners finally submitted the dispute to the appropriate tribunal, the System Board of Adjustment. A hearing was held

before the four-member System Board on May 22, 1972, a neutral fifth member has been appointed and the matter remains pending, awaiting System Board decision. As petitioners apparently now recognized, the System Board of Adjustment has exclusive primary jurisdiction of this dispute. Particularly inasmuch as petitioners have now invoked the System Board's jurisdiction, their Petition does not merit the attention of this Court.

III. THE PRESENT PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION OF FEDERAL LAW.

When the Petition for a Writ of Certiorari is considered in the light of (a) the procedural posture of the present matter, which involves an interlocutory ruling made in the discretion of the court, and the other alternate and independent grounds for the decision and (b) the absence of conflicting decisions and the clear correctness of the decision below, it is clear that the Petition in this case does not present an issue which rises to the level of a substantial question of federal law which should be reviewed by this Court at this time.

A. *The procedural posture of the case and alternative and independent grounds of decision make review unwarranted.*

The present action has not reached final judgment. The District Court merely denied petitioners' request for a preliminary injunction, and the case remains pending before that court. This lack of finality "of itself alone furnished sufficient ground for the denial" to the petition. *Hamilton-Brown Shoe Co.* v. *United States*, 240 U.S. 251, 258; cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-325.

Moreover, the lower courts disposed of petitioners' request for preliminary injunctive relief through the appropriate exercise of judicial discretion. The District Court weighed the competing interests and determined injunctive relief, on balance, to be unwarranted. The First Circuit spoke "in terms of traditional tests of irreparable injury and probability of success on the merits" and concluded that "the district court properly exercised its discretion" and "an injunction . . . would be inequitable" (Petition p. 27).

The courts below certainly cannot be charged with an abuse of discretion in light of the particular facts of this case. The petitioners waited six months after knowing of the execution of the merger agreement before even informally demanding negotiations. Subsequently they walked out of those negotiations.[4] Petitioners' delay meant necessarily that the judicial intervention petitioners asked, even if it were otherwise justified, would come at such a late stage that it would cause the Northeast-Delta merger to abort. To impair respondent's ability to merge would lead inevitably to financial disaster for both respondent and its employees and, as the CAB found (pp. 20-24 *infra*), might mean the termination of the transportation services provided by Northeast's system.

Furthermore, as has been noted (p. 7 *supra*), the proposed Northeast-Delta merger was not mentioned in any of the notices served pursuant to Section 6 of the Railway Labor Act. Thus, even if petitioners had such a right

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[4] As the First Circuit noted (Petition p. 27 n. 18), Northeast "expressed some willingness to bargain about incidental matters, . . . [but petitioners,] by refusing apparently to negotiate about anything until [Northeast] agreed to various demands, including, most strikingly, a consolidated seniority list comprehending the employees of both companies . . . made it impossible to know the extent of [Northeast's] willingness."

to bargaining as they claim, petitioners plainly did not comply with the requirements of Section 6 (see pp. 3-4 *supra*) with respect thereto.

The lower courts also recognized the futility of ordering respondent to bargain with petitioners: Northeast will not survive the merger and could not implement post-merger adjustments in any case. Nor would Delta, a stranger to the requested negotiations, as well as to these proceedings, be bound by any agreement reached between respondent and the petitioners. See *The William J. Burns International Security Services, Inc.* v. *NLRB*, —— U.S. —— (May 15, 1972).

As has been demonstrated (pp. 9-11 *supra*), the questions presented by the Complaint and the facts alleged therein are matters which Congress entrusted to special administrative bodies. The questions of protection of employees' rights in connection with the Northeast-Delta merger, including related procedures for settling disputes by negotiation and/or arbitration, were matters before the CAB, and the CAB decision in fact contains detailed determinations on those matters.[5] The interpretation of Article 3(B) is similarly within the exclusive jurisdiction of the System Board of Adjustment. On these bases, deferring to these two administrative bodies, this Court would have alternate and independent grounds for deciding the matter without reaching the question posed by petitioners. *The Arlington, Inc.* v. *Mayers*, 339 U.S. 965; *Sanson Hosiery Mills* v. *NLRB*, 195 F.2d 350 (5th Cir. 1952), *cert. denied*, 344 U.S. 863.

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[5] Delta, a stranger to both the present litigation and Northeast's expired contracts with petitioners, plainly is not required to bargain with petitioners except insofar as such bargaining may have been required pursuant to the CAB decision.

B. *The decision below is clearly correct and not in conflict with any precedent.*

Petitioners assert that the decision below conflicts both with certain decisions cited on page 7 of the Petition and with the "principle that underlies all these decisions". However, all the decisions relied upon by petitioners (1) arose under the Labor-Management Relations Act, whereas the case at bar is under the *Railway Labor Act*, (2) involve entreprenurial changes clearly distinguishable from a *merger*, (3) and, most important, do not involve a situation where the entreprenurial change contemplated had to receive *prior approval by a federal administrative agency* which was charged by Congress with the responsibility for considering and imposing—in the case at bar—labor protective provisions as conditions of the approval itself.

The Court of Appeals recognized that an employer may have a duty to bargain about the effects of certain corporate decisions in certain situations (Petition p. 22), as was held in *Morrison Cafeterias Consol., Inc.* v. *NLRB*, 431 F.2d 254 (8th Cir. 1970), and *NLRB* v. *Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970), cases petitioners cite as proof of a conflict. The First Circuit, however, distinguished between a merger and the partial or complete plant closing or relocation involved in the cases cited by petitioners on the grounds that a merger "does not immediately and directly eliminate jobs", that a merger, unlike the other entreprenurial changes is not unilateral, and that a merger is "the result of the decisions of two or more companies, depends on negotiations between the corporation involved, and affects the employees and the business of all the firms joined." (Petition pp. 22-23).

Narrowing its focus to the present matter, the Court of Appeals relied upon the fact that a merger in the airline industry under CAB regulation presents a situation entirely distinct from a non-regulated merger, in that the CAB conditions its approval of an airline merger upon acceptance of particular labor protective conditions and establishes procedures for expedited resolution of disputes arising in connection with the merger or the protections so provided. The First Circuit's decision on this matter, as is clearly illustrated by the subsequent CAB order imposing such labor protective conditions, is manifestly correct.

Plainly there is no conflict among circuits on the questions presented by petitioners. The inconsistency petitioners claim is illusory. Indeed, the fact that the decision of the court below is carefully reasoned and wholly consistent with precedent confirms that the Petition presents no question worthy of this Court's consideration.

Conclusion

For the reasons stated, the Court should deny the Petition for a Writ of Certiorari to review the judgment and opinion of the First Circuit on denial of a preliminary injunction.

Respectfully submitted,

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Appendix A

72-5-73
72-5-74

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 23315

Served: May 19, 1972

DELTA-NORTHEAST MERGER CASE

Decided: April 24, 1972

* * * * *

[The following is an opinion of Civil Aeronautics Board Chairman Browne, Vice Chairman Gillilland and Member Timm. Member Minetti filed a separate statement and Member Murphy filed a dissent, both of which discussed issues not related to the case at bar.]

* * * * *

OPINION

BY THE BOARD:

Delta Air Lines, Inc., Northeast Airlines, Inc., Storer Broadcasting Company (Broadcasting), Storer Leasing Corporation, George B. Storer, Sr., and Bill Michaels have jointly applied for approval of an agreement providing for the merger of Northeast into Delta and the transfer to the latter of Northeast's certificates of public convenience and necessity.[1] The applicants also request approval of both a related agreement between Delta and Broadcasting, and of interlocking relationships that will result from the election of Storer and Michaels to Delta's board

[1] Broadcasting wholly owns Storer Leasing and about 85 percent of Northeast's stock. George B. Storer is Chairman of the Boards of Directors of Broadcasting, Storer Leasing and Northeast. Bill Michaels holds the position of President in each of the three companies.

while they hold offices in Broadcasting and Storer Leasing.

After due notice, a public hearing was held before Examiner Arthur S. Present, who issued his decision recommending that the Board approve the merger and related agreements subject to conditions. Exceptions to the examiner's decision and briefs to the Board have been filed by various parties to the proceeding,[2] and oral argument has been heard. The case now is ripe for decision.

Upon examination of the record and consideration of the contentions of the various parties, we have concluded that we are in essential agreement with the examiner that the merger and related agreements should be approved subject to conditions, including a stay of the merged carrier's authority to operate the Miami-Los Angeles route. Accordingly, except as modified herein, the Board adopts as its own the findings, conclusions and recommendations of the examiner in his recommended decision, which is attached hereto as an appendix.

I.

This proceeding represents the second time in little more than a year in which the Board has been asked to consider a merger of Northeast Airlines with another air carrier. In the *Northwest-Northeast Merger Case*,[3] we approved a merger of Northeast into Northwest Airlines, but Northwest chose to terminate the merger agreement rather than accept the conditions the Board imposed. In our opinions in the *Northwest-Northeast* proceeding, we found that while Northeast was not *in extremis*, and could reduce its losses through retrenchment, its financial condition was precarious, and its prospects for the future were bleak.

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[2] Parties filing briefs and exceptions are listed in Appendix 2.

[3] Orders 70-12-162/163, Opinion and Order on Reconsideration, 71-3-8.

Since the issuance of those opinions, Northeast's financial condition has become considerably worse. For example, the latest figures for a full-year's operations of Northeast available to us in the *Northwest-Northeast* proceeding were for 1969. Since then Northeast suffered a loss of nearly eleven million dollars in 1970 (in spite of a marked cutback in operations and windfall traffic picked up as a result of a strike of a competitor), and Northeast reported on March 3 a net loss in 1971 of $13,922,000. Northeast's excess of debts over assets (negative shareholder equity) increased almost 50 percent in 1970, to $32,678,195. By the end of 1971, shareholder equity was approaching the *minus* $47 million mark. In keeping with these figures, long-term debt has increased from $64,355,307 at the end of 1969 to $72,430,684 on December 31, 1970, to more than $80,000,000 at the close of 1971. Finally, cash flow remains a serious problem, with revenues falling far short of meeting even operating expenses less depreciation and amortization, much less total cash needs.

Since at this juncture Northeast's operations are not even generating the cash Northeast needs for their day-to-day continuance, and because a carrier in Northeast's straits is hardly in a position to seek capital from normal money market channels, the continuance of Northeast's operations is entirely dependent on repeated and substantial infusions of cash by outside sources.

To date Broadcasting has been that source, providing most of the needed cash.[4] Broadcasting's board of directors, however, has determined to end Broadcasting's financial assistance of Northeast as of the close of this pro-

[4] See Orders 69-9-14; 70-1-38; 70-2-114; 70-11-43; 71-2-34; 71-4-36. Recently Delta has been assisting Broadcasting in this regard. See Order 71-6-78. As of December 31, 1970, Northeast was indebted to Broadcasting for almost $30,000,000. By November 30, 1971, the amount had increased to almost $38,000,000 with an additional $4,000,000 owed to Delta.

ceeding. Broadcasting's directors can always change their minds, of course. But the available evidence shows that there is a substantial likelihood that there will be no such reversal of course by Broadcasting's board.

In large part as a result of supporting Northeast, Broadcasting ended 1970 with a negative working capital position. A once extremely profitable company has seen its profits dwindle and, at least in 1969, turn to a loss.[5] Unless Broadcasting's cash position changes abruptly, continued outlays to Northeast would require Broadcasting itself to borrow the funds at a time when its own lenders are becoming concerned with its level of debts. With that background there is a believable ring to the testimony of Broadcasting's president, Bill Michaels, that unless some well-financed non-airline entity came "out of the woodwork" and chose to give Broadcasting some compensation for its holdings, it is unlikely that Broadcasting will continue to support Northeast in the event Northeast's merger with Delta fell through.[6] As Mr. Michaels put it, Broadcasting's management wants to "get back to running a business [*i.e.*, Broadcasting] with which our officers and directors feel they have reasonable familiarity and competence, rather than a business which poses a continuing drain on both our capital resources and our manpower attention . . . ."[7]

In view of Northeast's existing financial difficulties, if Broadcasting's financial backing of Northeast ends, it is highly likely that Northeast itself will come to an end forthwith, absent merger, acquisition or some presently uncontemplated financing arrangement. But even should Broad-

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[5] 1969 Broadcasting Annual Report at p. 12. In 1970 Broadcasting has a consolidated profit of $3.8 million (1970 Annual Report at 14), but a negative working capital position of almost $5,000,000 (*id.* at 12-13).

[6] Tr. 170-71.

[7] Tr. 172-73.

casting's board of directors reverse itself and Broadcasting's assistance thereby continue for some additional period, or even were Northeast somehow to find a way to struggle on for awhile without Broadcasting's aid, it is clear that absent a change in fortunes of minor miracle proportions Northeast could not remain in operation for long. For the continuance of those operations ultimately rests on Northeast's ability to generate a profit. And it is now more than apparent that as long as Northeast remains a separate entity there is essentially no hope that that will happen.

Northeast has lost money in virtually every year since it was awarded expanded authority in 1956,[8] despite capital infusions by three separate managements, beginning with Atlas Corporation and progressing through Hughes Tool Company to Storer Broadcasting. The following chronology gives eloquent testimony to the financial misery that has plagued the carrier and its successive managements:

Northeast profit (or loss):	*1960-1970*	
1960	($10,814,000)	
1961	($9,442,000)	Hughes took over
1962	($9,450,000)	
1963	($15,301,000)	
1964	($3,447,000)	
1965	($1,408,000)	Broadcasting took over
1966	$1,000	
1967	($6,514,000)	
1968	($2,422,000)	
1969	($28,843,000)	
1970	($10,721,000) [9]	
Net loss, 1960-1970	($98,361,000)	

The retrenchment program which Northeast undertook in 1969 in an effort to cut these losses has resulted in sus-

[8] See New York-Florida Renewal Case, 38 C.A.B. 680, 683 (1963).
[9] Source: 1960 to 1968, Handbook of Airline Statistics, Table 25; 1969-1970, Annual Reports for the respective years.

pension of the carrier's service to numerous points in Northern New England (replaced by substitute service of Mohawk or third-level carriers). In other markets which it continues to serve Northeast has cut the number of frequencies operated. Between November 1, 1969 and May 1, 1971 the airline reduced the number of employees in active service from 4,450 to 3,689. Furloughs accounted for a substantial portion of the reduction.[10]

Despite the cutbacks, as stated above, Northeast has recently reported a net loss in 1971 of nearly $14 million. Nor will 1972 be much of an improvement since Northeast's management has forecast a loss of between $10,500,000 and $11,000,000.[11] Problems such as these breed even more difficulties: the uncertainty surrounding the future of the carrier has contributed to the loss of nineteen out of twenty-five of the carrier's senior officers and department heads since November 1969,[12] and many of the present Northeast senior officials have little airline experience.[13]

Nor does any feasible route strengthening program seem to offer any solution to the carrier's dilemma. Even assuming that routes exist that both (1) require additional service, and (2) might fit into the Northeast system, Northeast simply does not have the financial wherewithal to mount the effective operation necessary to penetrate a new market and capture enough traffic to make the enterprise profitable. Perhaps this inability is most clearly manifested in Northeast's operation of the Miami-Los Angeles route. Although the carrier was granted the route for purposes of route strengthening, it has not been able to mount an operation that is reasonably competitive with National's existing operation. For example, Northeast's

[10] J.E. 241.
[11] Tr. Page 177.
[12] Tr. page 209.
[13] See Tr. pp. 172-73.

financial position has prevented it from using four-engine jet equipment in the market in competition with National which employs B-747 and DC-8 as well as three-engine B-727-200 equipment on the route. Northeast is currently using the smaller Boeing 727-100 aircraft. In addition Northeast has been forced to cut back to a single daily round-trip flight, in the face of numerous flights by National. It is thus clear that award of the route has not "strengthened" Northeast, nor made the carrier better able to survive on its own.

Finally, it is unlikely that Northeast could continue operating even under a Chapter X reorganization. That avenue of survival generally requires at least the ability to generate sufficient cash flow to service operating costs. Northeast shows no sign of being able to attain even that limited goal.[14]

Were Northeast to close its doors, the impact on the public interest would be felt in several areas. As regards the traveling public, practically all of Northern New England would be without the service of a certified air carrier, for at least a temporary period. Further, as Examiner Present noted, the 900,000-plus travelers who would otherwise choose to travel on Northeast between the northeastern cities of the United States and Florida would no longer have the carrier of their choice available.[15] When markets such as Boston-Bermuda (Northeast carried 53,126 out of 133,830 passengers in 1970) and Northeastern U.S.-Bahamas (Northeast carried 98,498 out of 248,949 passengers in

[14] While no party has seriously raised the point, in theory Northeast could perhaps be sustained as an independent entity through the use of the Board's subsidy authority. In the Board's view, however, the use of subsidy payments for this purpose would be neither practicable nor in the public interest. Indeed, the reasons the Board rejected subsidy as an alternative to Capital's merger with United are in point here. See 33 C.A.B. at 311.

[15] See p. 13, *infra*, for a further description of the Northeastern U.S.-Florida markets.

1970) are added in and consideration is given to the significant spur Northeast provides in a few other important markets, including Boston-Miami/Ft. Lauderdale/Tampa, New York/Philadelphia/Baltimore-Ft. Lauderdale and Philadelphia-Jacksonville, the adverse effect on the traveling public of a cessation of Northeast's operations becomes apparent.

In many cases, of course, this effect of Northeast's demise would be limited to the length of time it would take to authorize another carrier to provide the service performed by Northeast. But in view of the fact that at last count Northeast was carrying about 7,000 passengers per day, even the temporary impact on travelers would in the aggregate be substantial.

As a matter of further concern, the demise of the carrier would leave the carrier's 3,700 active employees jobless at a time when many other airlines are filling their need for additional personnel by recalling their own furloughed help.[16] In addition, we cannot help but note that many of those who would be unemployed are located in New England, an area of the country already suffering from relatively heavy unemployment.

Finally, Northeast's collapse would almost certainly wipe out the investment of Northeast's shareholders, and result in only limited recovery by the carrier's creditors. Whether these losses are viewed in their own right, or in light of their probable impact on the ability of other airlines to obtain capital on favorable terms,[17] they must be taken into account in view of the size and importance of Northeast to the air transportation system.

There is no dispute that the widespread adverse impact that would be attendant upon a failure of Northeast would

[16] Northeast's furloughed employees would lose their reemployment rights. Of course, as long as Northeast remains a separate entity, those rights are largely theoretical.

[17] See United-Capital Merger Case, 33 C.A.B. 307, 314 (1961).

be avoided by a merger of Northeast into Delta. In addition, as the examiner found, a Delta-Northeast merger would have benefits of its own even if Northeast's operations were likely to continue at their present levels absent the merger.

* * * * *

III.

A number of changes to the Board's standard labor protective conditions have been recommended by the examiner, urged by the labor parties and opposed by the applicants. All the points made by the examiner and the parties here have been considered in connection with the review of all the proposed modifications of the standard labor protective conditions that we undertook in the *Allegheny-Mohawk Merger Case*.[37] Our general conclusions concerning changes in the labor protective conditions are set forth in *Allegheny-Mohawk* and will not be repeated here.[38] We will, however, consider several problems raised by the unique circumstances of this case, and which clearly warrant special consideration.

The first such problem concerns the determination of the appropriate cutoff date for purposes of section 10 of the labor protective provisions. Section 10 provides:

> If either carrier, on or after [a specified date] shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this order as an employee immediately affected by the merger, the provisions of this order shall apply to such employee as of the date when he is so affected.

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[37] Orders 72-4-31/32 at pp. 18-33.

[38] Suffice to say that for the reasons and with the interpretations stated there, we shall make no substantive alterations in the standard labor provisions with the exception of condition 13, which relates to procedures for arbitration.

The date usually chosen for inclusion in section 10 is the date of the merger applicants' agreement in principle to merge. Any employee believing himself injured by carrier action in anticipation of the merger after this date can make claim against the carrier for compensation. If the date of the agreement in principle to merge were used here, the date would be April 23, 1971. The examiner, however, specifically recommended that that date not be used. Instead he found that the current proceeding is a continuation of the circumstances set in motion when Northeast determined in September 1969 that it must seek a merger partner. The examiner concluded that since Northeast may have taken steps affecting its employees on the basis of the agreement in principle to merge with *Northwest*, any employees affected thereby are entitled to protection despite the fact that the ultimate merger will be with Delta rather than Northwest. He therefore recommends that the cutoff date here be November 11, 1969, the date on which Northwest and Northeast announced their agreement in principle to merge, rather than April 23, 1971.

Delta objects to use of the earlier cutoff date and asserts that it entered into the current agreement in anticipation of assuming only the labor protective costs resulting solely from Northeast's merger with Delta, and the reference back to the Northwest merger would subject it to the possibility of extensive liabilities wholly unconnected with the instant case.

We have very carefully considered this issue. If Northeast did adjust its forces in anticipation of the Northwest merger, and if that adjustment adversely affected any of Northeast's employees — especially the 761 who left Northeast's active service between November 1, 1969, and May 1, 1970.[39] — there clearly are reasonable grounds for provid-

[39] No party has pointed us to evidence of record herein that would indicate whether any of Northeast's employees were adversely affected by actions of Northeast in anticipation of a merger.

ing that those employees receive the protection of the *United-Capital* conditions in the case of the following Delta-Northeast merger. For one thing, assuming that Northeast did make such adjustments, Delta may stand to benefit from them. For instance, there may be fewer Northeast employees to integrate into Delta's work force or, alternatively, to compensate. Furthermore, again assuming a Northeast cutback in contemplation of merger, it is possible that without a merger with Delta, Northeast might rehire some of the furloughed personnel. Finally, a reasonable argument can certainly be made that it is unfair to deny labor protective conditions to employees adversely affected by a Northeast decision to make employment changes in contemplation of a merger simply because the merger partner turned out to be a different one than originally contemplated by Northeast.

On the other hand, the affected Northeast employees would have had no rights whatever under the labor protective provisions if no other merger followed the Northwest-Northeast proposal. Moreover, had no merger partner come along, practically all of Northeast's employees — including those, if any, affected by Northeast actions in anticipation of the Northwest merger — would be in a considerably worse position than they will be upon consummation of the Delta-Northeast merger. In the same vein, were the use of the Northwest-Northeast cutoff date to result in Delta's pulling out — as Delta suggests might happen[40] — Northeast would be likely to collapse not long thereafter, resulting in a loss of jobs for all of the em-

[40] While it is possible that a change in cutoff dates would make the labor protective conditions applicable to very few more employees than would the use of the normal cutoff date, it also appears possible that Delta would incur heavy additional liabilities. Since responsible management must give careful weight even to unlikely possibilities when large sums are involved, the carrier's claim that the change might end merger possibilities cannot be discounted.

ployees, as well as causing the other injury to the public interest we discussed earlier in this opinion.

We cannot agree with the examiner that the same reasoning that leads to the institution of the section 401(g) proceeding in regard to the Miami-Los Angeles route requires the use of the Northwest-Northeast cutoff date. As discussed earlier, we do agree that the Delta-Northeast merger proposal is a result of factors set in motion by Northeast's 1969 decision to merge.[41] But that by no means leads necessarily to the use, for section 10 purposes, of the date of the Northwest-Northeast agreement in principle to merge. The continuing nature of Northeast's search for a merger partner is relevant in regard to Miami-Los Angeles non-transfer issues, because to hold otherwise would be to reward Northeast's management for actions affecting the integrity of the Board's adjudicatory processes. In regard to the section 10 issues, however, even if it is assumed that Northeast in fact did make changes in its work force in contemplation of the Northwest merger, there is not a scintilla of evidence to the effect that such action was done with an improper intent or in some other respect might impair the integrity of the Board's processes.

It is evident that in light of the foregoing considerations, there can be no completely satisfactory answer to the question of what treatment should be accorded to those Northeast employees who may have been adversely affected by action by Northeast in contemplation of a merger with Northwest. We conclude, however, that the public interest would best be served by using April 23, 1971, the date of Delta's agreement in principle to merge with Northeast, as the cutoff date for purposes of section 10 of the labor protective conditions, and by providing that before Delta may offer employment to outside individuals, it must recall Northeast employees furloughed subsequent to the North-

[41] See pp. 27-30 above.

west-Northeast agreement in principle to merge. It would appear that Northeast presently has contractual obligations to recall at least some of its furloughed employees before hiring outsiders. Upon merger with Northeast, Delta will become similarly obligated.[42] However, it may be that such obligations will, by reason of contract terms, be short-lived or that at least some Northeast employees will not be protected after the merger. Accordingly, we shall condition our approval of this merger upon a requirement that Delta Ail Lines offer reemployment to all Northeast personnel furloughed after November 11, 1969 (no matter when after that date they were furloughed, or for what reason they were furloughed) as, and to the extent that, openings occur in the relevant classes or crafts. The seniority practices and the recall procedure and rights employed by Northeast Airlines will determine the order and procedure of such recall. In order to provide a mechanism for the resolution of disputes that may arise in the application of this condition, we shall make the modified section 13 of the labor protective provisions applicable to such disputes.

One final labor problem unrelated to the standard labor provisions remains to be solved. Northeast's labor contracts with some of its employees provide for the cash accrual of sick leave benefits. If the employee retires, resigns or is laid off, he can take his accumulated sick leave (up to 120 days) with him in cash. IAMAW urges that a condition be imposed that would require Delta to pay each employee who retires, resigns, or is laid off, the amount of money due him under the sick leave provisions of his contract with Northeast on the effective date of the merger.

The Board considers that the imposition of such a requirement is unnecessary. Assuming that the sick leave accrual conditions of the Northeast contract with its employees constitute a "debt," "liability," "duty," or "ob-

[42] See Order 70-12-161.

ligation" of Northeast within the meaning of the Agreement to Merge,[43] Delta, as the surviving corporation under the Agreement to Merge, has thereby agreed to honor such rights of Northeast's employees. There is no reason to presume that Delta will not abide by its commitment. Further, the Board's retained jurisdiction will enable us to issue a subsequent order in regard to the sick leave accrual rights of Northeast's employees should that become appropriate.

Finally, the Board will retain jurisdiction for purposes of imposing, by subsequent order, such reporting requirements as may be appropriate in order to obtain data concerning, on the one hand, the extent to which affected employees are benefited by our imposition of labor protective conditions, and, on the other, the costs incurred by Delta as a result of labor protective provisions.

* * * * *

APPENDIX 1

Labor Protective Provisions

Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by the proposed merger of Delta Air Lines, Inc. and Northeast Airlines, Inc. approved by the attached order, and it is the intent that such conditions are to be restricted to those changes in employment due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about by other causes are not covered by or intended to be covered by these provisions.

Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate

[43] See Exhibit B of the amended application of the joint applicants.

airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either Delta or Northeast or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to Delta pursuant to the approval granted in the attached order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to his displacement so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation

exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall only apply to displacements occurring within a period of 3 years from the effective date of the merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a "dismissal allowance"), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the merger. This dismissal allowance will be made to each eligible employee, while unemployed, by Delta during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of service *Years*	*Period of payment* *Months*
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purpose of these provisions, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month's service for each month in which he performed any serv-

ice (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided,* That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of the merger who is not deprived of his employment within 3 years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall keep [Delta] informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be

given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided,* That this shall not apply to employees with less than 1 year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of —

1. Failure without good cause to return to service after being notified of a position for which he is eligible and as provided in paragraphs (f) and (g).

2. Resignation.

3. Death.

4. Retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally.

5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in these provisions) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service *Year*	*Separation allowance* *Months' pay*
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to the time of the merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the merger (or who is later

restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed 2 working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the merger, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the

sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby; *Provided, however,* That if the home is not sold within a substantial period of time after the merger, then the fair value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and,

in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser; and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after April 23, 1971, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under these provisions as an employee immediately affected by the merger, these provisions shall apply to such an employee as of the date when he is so affected.

Section 11. Delta and Northeast shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of

either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the merger shall be agreed upon within 10 days after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of the attached order.

Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternately striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if

unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

APPENDIX 2

PARTIES FILING EXCEPTIONS AND BRIEFS

1. Briefs to the Board were filed by the following parties:

Delta Air Lines, Inc.*
Eastern Air Lines, Inc.*
National Airlines, Inc.*
Continental Air Lines, Inc.*
Mohawk Airlines, Inc.*
Allegheny Airlines, Inc.*
Pan American World Airways, Inc.*
Department of Transportation*
Air Line Pilots Association, International*
International Association of Machinists and Aerospace Workers*
Master Executive Council of Delta Pilots*
Master Executive Council of Northeast Pilots*
Massachusetts Port Authority*
City of Bangor and Greater Bangor Area Chamber of Commerce*
State of Maine
West Palm Beach parties*
City and Chamber of Commerce of Philadelphia
City of New Orleans
City and Chamber of Commerce of Atlanta
New England Council for Economic Development
City and Chamber of Commerce of New Orleans
Burlington Vt. parties
Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission (By special leave of the Board — Order 71-12-12)
Detroit parties
Greater Miami Traffic Association
Bureau of Operating Rights*

* These parties filed exceptions to the examiner's recommended decision.

2. The following parties have adopted their brief to the examiner as their brief to the Board:
   Northeast Airlines, Inc./Storer Broadcasting Co.*
   Braniff Airways, Inc.
   City and Chamber of Commerce of Houston
   Jacksonville parties

Air Line Dispatchers Association filed a brief to the examiner and exceptions, but filed neither a brief with the Board nor adopted its brief to the examiner.

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Order 72-5-73

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 24th day of April, 1972

Docket 23315

DELTA-NORTHEAST MERGER CASE

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED THAT:

1. Subject to the conditions specified below, the joint application of Delta Air Lines, Inc. (Delta), Northeast Airlines, Inc. (Northeast), Storer Broadcasting Company,

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* These parties filed exceptions to the examiner's recommended decision.

George B. Storer, Sr., and Bill Michaels, for approval of an agreement dated May 12, 1971, providing for a merger of Delta and Northeast, as well as for approval of the related agreement of the same date between Delta and Storer Broadcasting Company, be and it hereby is approved (except insofar as it relates to the transfer to Delta of th certificates of public convenience and necessity issued to Northeast for routes 27F, 154, 158 and 167);

2. The approval granted herein is subject to the following conditions:

(a) The authorization of Delta to operate segment 7 of Northeast's certificate for route 27 (Miami/Ft. Lauderdale, Florida-Los Angeles/Ontario/Long Beach, California) be stayed pending final decision in a proceeding instituted for the purpose of reexamination of such authorization to be instituted upon transfer of the certificate;

(b) The transferred certificate for route 27 shall be subject to whatever determinations are made regarding segment 7 in such proceeding;

(c) In accounting for the merger, either as a purchase or a pooling of interests, the assets and liabilities of Northeast shall be transferred to Delta at the values shown on the books of Northeast as of the effective date of the merger, as defined in the merger agreement, and a plan of accounting for the merger, including a balance sheet for Northeast prior to the merger and proposed general journal entries to record the transaction on the books of Delta, shall be submitted to the Board's Bureau of Accounts and Statistics for prior approval;

(d) Any excess of the consideration given by Delta over the net book value of the transferred assets and liabilities as then recorded by Northeast shall not be recognized or claimed for future ratemaking or other regulatory purposes;

(e) In the event the transaction is treated as a pur-

chase, any excess of the agreed purchase price over the net book value of the transferred assets and liabilities as then recorded by Northeast shall be charged off directly by Delta to "Account 2940 Unappropriated Retained Earnings." As an alternative, the excess may be charged to "Account 1870 Property Acquisition Adjustment";

(f) In the event Delta elects to charge the excess to "Account 1870 Property Acquisition Adjustment," the financial statements published by Delta disclose, on the face of each statement, the unamortized balance, and any amortizations of recorded property acquisition adjustments, as: "Merger costs not recognized or claimed for regulatory purposes;" provided that, at Delta's option, amounts so categorized may be divided so as to disclose separately from other amounts, any amounts associated with differences, as of the effective date of the merger, between the fair values and the net book values of the transferred tangible and intangible assets, respectively; and

(g) Delta shall be subject to the labor protective conditions set forth in Appendix 1 attached hereto;

(h) Delta shall offer reemployment to all Northeast personnel furloughed after November 11, 1969 (no matter when after that date they were furloughed, or whether the furlough was merger related) as, and to the extent that, openings occur in the relevant classes or crafts. The seniority practices and the recall procedure and rights employed by Northeast Airlines will determine the order and procedure of such recall. Any dispute arising from the application of this condition shall be resolved by the procedure set forth in section 13 of the labor protective provisions.

3. The interlocking relationships involving George B. Storer, Sr., Bill Michaels, Delta, Storer Broadcasting Company, and Storer Leasing Corporation, arising from the contemplated election of Messrs. Storer and Michaels as

Directors of Delta in accordance with the aforesaid Delta-Northeast merger agreement, be and they hereby are approved, subject to the condition that, apart from the lease transactions approved by Order E-22998, December 15, 1965, as to which Delta will replace Northeast as a party in interest, transactions between Storer Broadcasting Company and Delta or Storer Leasing Corporation and Delta shall not, in either instance, aggregate more than $100,000 in any calendar year, unless prior approval is obtained from the Board;

4. Jurisdiction is hereby reserved (1) to make such amendments, modifications, and additions to the labor protective conditions imposed by paragraphs 2(g) and 2(h) above as the circumstances may require; (2) to impose appropriate reporting requirements concerning said labor protective provisions; and (3) for the purpose of imposing from time to time, such further terms and conditions on the approvals granted by paragraph 3 hereof as the Board may find to be just and reasonable;

5. At such time as the applicants submit to the Board a statement indicating their unequivocal acceptance of the conditions imposed by paragraph 2 above, and make an appropriate showing that all necessary steps have been completed for the consummation of the merger and that the license fee required by section 389.25(a)(2) of the Regulations has been paid, the certificate of public convenience and necessity for route 27 and all other operating authority held by Northeast, including authorizations to suspend service at various points, will be transferred to Delta by appropriate Board order, subject to conditions set forth in paragraph 2(a) and (b) above;

6. Except to the extent granted, the application and all other requests herein be and they hereby are denied; and

7. This order shall become effective upon the effective

date of approval by the President of Order 72-5-74 dated April 24, 1972.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

Order 72-5-74

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 24th day of April, 1972

Docket 23315

DELTA-NORTHEAST MERGER CASE

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Civil Aeronautics Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED THAT:

1. Subject to the conditions imposed by Order 72-5-73, dated April 24, 1972, the joint application of Delta Air Lines, Inc., and Northeast Airlines, Inc., for approval of the agreement of May 12, 1971, providing for a merger of these two companies, as well as for approval of the related agreement of the same date between Delta and Storer Broadcasting Company, be and it hereby is approved insofar as it relates to the transfer to Delta of the certificates

of public convenience and necessity issued to Northeast for routes 27F, 154, 158, and 167;

2. At such time as Delta complies with paragraph 5 of Order 72-5-73, dated April 24, 1972, the certificates of public convenience and necessity held by Northeast authorizing it to engage in air transportation over routes 27F, 154, 158, and 167 will be transferred to Delta by appropriate Board order; and

3. This order shall become effective on the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

HARRY J. ZINK
Secretary

(SEAL)

THE WHITE HOUSE
APPROVED:
RICHARD NIXON
May 19, 1972

* * * * *

Appendix B

To Be Completed in Triplicate PP-13 3/59

Case No. 1726-147-72 Date April 24, 1972

GRIEVANCE REPORT

SUBMITTED PURSUANT TO CONTRACT BETWEEN
NORTHEAST AIRLINES, INC. AND DISTRICT 147,
INTERNATIONAL ASSOCIATION OF MACHINISTS

Name W. J. Sutherland & M. R. Jackson *Department* 793
Location Boston

Nature of Grievance The Company is in violation of Article 3, Paragraph B in failing to meet with the Union in good faith to negotiate for proper provisions for the protection of employees' seniority and other rights.

The Union is requesting all necessary relief including an injunction and damages for the Company's failure to live up to its contractual obligations.

Date Filed April 24, 1972

(s) W. J. SUTHERLAND
x) W. J. SUTHERLAND

(s) M. R. JACKSON
x) M. R. JACKSON

..... April 24, 1972
Signature of Employee *Date*

* * * * *

[Letterhead — INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS]

May 5, 1972

John J. Kilkelly, Chairman
NE - I.A.M. System Board of Adjustment
NORTHEAST AIRLINES, INC.
239 Prescott Street
East Boston, Massachusetts 02128

Dear Mr. Kilkelly:

Because of the importance and urgency of the matter contained in case number 1726-147-72, we are requesting under Article 19, Paragraph H, that you call a meeting of the full board at the earliest possible date.

Very truly yours,

(s) LOUIS D. PESCE
LOUIS D. PESCE

(s) LEONARD R. MEUSE
LEONARD R. MEUSE

cc: W. J. SUTHERLAND